

13
No. 93-1170-CFX
Status: GRANTED

Title: United States, et al., Petitioners
v.
National Treasury Employees Union, et al.

Docketed:
January 19, 1994

Court: United States Court of Appeals for
the District of Columbia Circuit

Counsel for petitioner: Solicitor General, Solicitor General

Counsel for respondent: Vanderstar, John, Roth, Mark D.,
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12-10-93 ext til 1-19-94, C.J., CITED. Opinion
amended 4-8-93.

Entry	Date	Note	Proceedings and Orders
1	Dec 9 1993	G Application (A93-475) to extend the time to file a petition for a writ of certiorari from December 20, 1993 to January 19, 1994, submitted to The Chief Justice.	
2	Dec 10 1993	Application (A93-475) granted by the Chief Justice extending the time to file until January 19, 1994.	
3	Jan 19 1994	G Petition for writ of certiorari filed.	
5	Feb 8 1994	Order extending time to file response to petition until March 24, 1994.	
8	Mar 23 1994	Brief of respondents National Treasury Employees Union, et al. in opposition filed.	
6	Mar 24 1994	Brief amicus curiae of Common Cause filed.	
7	Mar 30 1994	DISTRIBUTED. April 15, 1994 (Page 15)	
20	Apr 18 1994	Petition GRANTED. *****	
11	May 18 1994	Writ of certiorari as to respondent Thomas C. Fishell dismissed pursuant to Rule 46.	
13	May 25 1994	Order extending time to file brief of petitioner on the merits until June 13, 1994.	
14	Jun 9 1994	Joint appendix filed.	
15	Jun 10 1994	Brief amicus curiae of Common Cause filed.	
16	Jun 13 1994	Brief of petitioners United States, et al. filed.	
19	Jun 17 1994	Order extending time to file brief of respondent on the merits until July 29, 1994.	
21	Jul 29 1994	Brief amici curiae of Freedom to Read Foundation, et al. filed.	
22	Jul 29 1994	Brief of respondents National Treasury Employees Union, et al. filed.	
23	Jul 29 1994	Brief amicus curiae of Public Citizen, Inc. filed.	
24	Jul 29 1994	Brief amicus curiae of Senior Executives Association filed.	
25	Jul 29 1994	Brief amicus curiae of Peter Bollen filed.	
26	Aug 9 1994	CIRCULATED.	
27	Aug 17 1994	SET FOR ARGUMENT TUESDAY, NOVEMBER 8, 1994. (1ST CASE).	
30	Aug 19 1994	Record filed.	
		* Partial record proceedings United States Court of Appeals for the District of Columbia.	
29	Sep 1 1994	X Reply brief of petitioners filed.	
31	Sep 7 1994	Record filed.	
		* Original record proceedings United States District Court	

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32	Nov 8 1994	for the District of Columbia. ARGUED.	
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**PETITION
FOR WRIT OF
CERTIORARI**

931170 JAN 19 1994

No.

OFFICE OF THE CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1993

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

NATIONAL TREASURY EMPLOYEES UNION, ET AL.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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154 PR

QUESTIONS PRESENTED

Section 501(b) of the Ethics in Government Act of 1978, as amended, 5 U.S.C. App. 501 (Supp. IV 1992), prohibits the receipt of honoraria for any appearance, speech, or article by Members of Congress and by employees and officers in all three branches of government. The questions presented are:

1. Whether Section 501(b) violates the First Amendment rights of employees in the Executive Branch by prohibiting the receipt of honoraria when neither the expression nor the payment has any nexus to federal employment.

2. Whether, if Section 501(b) does infringe the First Amendment to that extent, the court of appeals erred in completely invalidating Section 501(b) as applied to all expression by Executive Branch employees, rather than invalidating it only as applied to cases where neither the expression nor the payment has any nexus to federal employment.

II

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the United States, the Office of Government Ethics, the Attorney General, the Director of the Office of Government Ethics, the National Treasury Employees Union, Jan Adams Grant, Thomas C. Fishell, the American Federation of Government Employees, David E. Hubler, Peter G. Crane, Richard Deutsch, William H. Feyer, Judith L. Hanna, George J. Jackson, Eduard Mark, Arnold A. Putnam, Charles E. Fager, and Robert A. Gordon. The district court also certified a class representing all employees in the Executive Branch below the grade of GS-16.

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In the Supreme Court of the United States
OCTOBER TERM, 1993

No.

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

NATIONAL TREASURY EMPLOYEES UNION, ET AL.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

The Solicitor General, on behalf of the United States, *et al.*, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW —

The opinion of the court of appeals, App., *infra*, 1a-58a, is reported at 990 F.2d 1271. The opinions filed on the denial of rehearing en banc, App., *infra*, 80a-107a, are unreported. The opinion of the district court, App., *infra*, 59a-78a, is reported at 788 F. Supp. 4. An opinion of the court of appeals affirming the denial of a preliminary injunction is reported at 927 F.2d 1253.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1993. The petition for rehearing was denied on September 21, 1993. On December 10, 1993, the Chief Justice ex-

tended the time within which to file a petition for a writ of certiorari to and including January 19, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTION, STATUTE, AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law * * * abridging the freedom of speech." The relevant portion of the Ethics in Government Act of 1978, as amended, 5 U.S.C. App. 501 *et seq.* (Supp. IV 1992), is set forth in the appendix to the petition. App., *infra*, 108a-113a. The relevant regulations implementing that Act are set forth in the appendix to the petition. App., *infra*, 114a-134a.

STATEMENT

1. In the Ethics Reform Act of 1989 (Reform Act), Pub. L. No. 101-194, 103 Stat. 1716, Congress provided that "[a]n individual may not receive any honorarium while that individual is a Member, officer or employee." 103 Stat. 1760, codified at 5 U.S.C. App. 501(b) (Supp. I 1989). The prohibition was made applicable to all officers or employees of the federal government except for Senators, senate staff, and "special Government employee[s]," as defined in 18 U.S.C. 202. 103 Stat. 1761-1762, codified at 5 U.S.C. App. 505(1) and (2) (Supp. I 1989). The term "honorarium" was defined to mean

a payment of money or any thing of value for an appearance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual * * *

103 Stat. 1762, codified at 5 U.S.C. App. 505(3) (Supp. I 1989).

In 1991, Congress amended Section 505 by extending the prohibition against the receipt of honoraria to the Senate and

its staff. Congressional Operations Appropriations Act of 1991, Pub. L. No. 102-90, Tit. I, § 6(b)(2), 105 Stat. 450. In the same Act, Congress also amended the definition of honorarium to deal specifically with a series of appearances, speeches, or articles. Tit. III, § 314(b), 105 Stat. 469. The definition, as amended, now reads:

The term "honorarium" means a payment of money or any thing of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government) by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual * * *

5 U.S.C. App. 505(3) (Supp. IV 1992).¹

2. Section 501(b) was enacted into law on November 30, 1989, and was to take effect on January 1, 1991. Reform Act, Tit. VI, § 603, 103 Stat. 1763. In late 1990, before the provision went into effect, several Executive Branch employees and unions that represent them commenced actions in the United States District Court for the District of Columbia challenging the constitutionality of the honoraria ban under the First Amendment and seeking an injunction against its enforcement.² App., *infra*, 3a, 60a-61a; C.A. Joint Appendix

¹ With respect to Executive Branch employees, the Act is administered by the Office of Government Ethics (OGE) and designated agency ethics officers, 5 U.S.C. App. 503(2) (Supp. IV 1992). OGE has promulgated implementing regulations. 5 C.F.R. 2636.201 *et seq.* set forth at App., *infra*, 114a-134a. The Act is enforceable through a civil action brought by the Attorney General seeking a penalty of not more than \$10,000 or the amount of prohibited compensation received, whichever is greater. 5 U.S.C. App. 504(a) (Supp. IV 1992).

² Respondents also requested a preliminary injunction. The district court denied that relief, and its denial was upheld on appeal. *National Treasury Employees Union v. United States*, 927 F.2d 1253 (D.C. Cir. 1991).

30A-30NN. The district court consolidated the actions, certified a class of all federal employees below grade GS-16 who would receive honoraria but for the prohibition contained in Section 501(b), and granted summary judgment in favor of the plaintiffs. App., *infra*, 3a, 60a, 78a.

The court ruled that Section 501(b) violates the First Amendment rights of Executive Branch employees because it is "over-inclusive" to the extent it prohibits the receipt of honoraria despite the absence of a relationship between the subject matter of the expression and the employee's federal employment or the identity or motives of the payor. App., *infra*, 73a. The court also ruled that the provision is constitutionally "under-inclusive" to the extent that it permits artists or performers to receive honoraria while barring similar payments to speechmakers and essayists. *Ibid.* As relief, the court struck down the honoraria ban in its entirety as applied to Executive Branch employees, but left the ban intact as applied to ^{THE} Legislative and Judicial Branches.³ *Id.* at 73a-78a.

3. A divided court of appeals affirmed. App., *infra*, 1a-58a. The majority concluded that Section 501(b) violates the First Amendment rights of federal employees because the honoraria ban is not "narrowly tailored." *Id.* at 14a. The court noted that Section 501(b) prohibits honoraria even when the payment has no "nexus between the employee's job and either the subject matter of the expression or the character of the payor." *Id.* at 9a. It concluded that, absent such a nexus, the receipt of honoraria would create neither actual impropriety nor the appearance of impropriety on the part of federal employees. *Ibid.* The court also concluded that Congress's across-the-board ban on the receipt of honoraria by Executive Branch employees could not be justified as a prophylactic measure to prevent abuses or to avoid administrative bur-

³ The district court enjoined the government from enforcing the ban, but stayed its judgment and permanent injunction "pending completion of proceedings on any timely appeal." App., *infra*, 78a.

dens in determining whether particular compensated speech has a nexus to federal employment. *Id.* at 11a-14a.

Having held that Section 501(b) has an unconstitutional "excess sweep," the court of appeals turned to the issue of remedy. App., *infra*, 14a. The court recognized that it should "refrain from invalidating more of the statute than is necessary." *Ibid.* (citation omitted). Nevertheless, the court concluded that Section 501(b) must fall in its entirety as applied to Executive Branch employees because the provision "does not seem to admit of any construction that would trim off all or even most of the invalid applications to executive branch employees." App., *infra*, 14a. The court stated that "[a]rticulation of some appropriate nexus test" to limit Section 501(b) to constitutional scope "would seem a purely legislative act." *Ibid.*

The court of appeals found, however, that the application of the honoraria ban to the Legislative and Judicial Branches could be saved. In the court's view, Congress "clearly would have gone forward [with Section 501(b)] as to the legislative branch and in all probability as to the judicial [branch]," even if Congress had known of the provision's "unconstitutionality as applied to executive branch employees." App., *infra*, 15a. The court therefore left Section 501(b) in place as applied to the Legislative and Judicial branches. *Id.* at 17a-18a.

Judge Sentelle filed a lengthy dissent. App., *infra*, 20a-58a. He argued that the majority had erred in treating this case as presenting a facial challenge to Section 501(b), rather than a challenge to the honoraria ban as applied to the plaintiffs. He also contended that the flat ban on honoraria is justified by the government interest in avoiding the appearance of impropriety on the part of Executive Branch employees, and by the interest in devising an administrable prohibition. Finally, he believed that the majority had erred in determining which applications of the statute to sever.⁴

⁴ Judge Sentelle thought that the majority's facial invalidation of the honoraria ban should have led it to strike the phrase "officer or

4. The United States sought rehearing, and suggested rehearing en banc. The court of appeals denied the petition for rehearing and, over the dissents of Judges Sentelle and Silberman, rejected the suggestion for rehearing en banc. App., *infra*, 79a-81a. Judge Silberman's dissent remarked that the "intrinsic importance of [the panel's] decision"—finding the honoraria ban unconstitutional as to the Executive Branch, but not as to the Legislative or Judicial Branches—"is hardly to be questioned." *Id.* at 88a.

REASONS FOR GRANTING THE PETITION

When Congress recently revised the ethics laws governing the conduct of federal officials, it imposed a uniform and complete ban on honoraria for federal employees and officials in all three branches of government. In the wake of criticism of the practice of receiving honoraria, Congress determined that a flat ban was necessary to ensure the integrity, and the appearance of integrity, of those individuals who represent and are employed by the federal government.

The court of appeals' decision overturns a large part of that congressional judgment by declaring a federal statute unconstitutional. The court held that the honoraria ban violates the First Amendment by prohibiting compensation for expression that has no nexus to an employee's federal status. It went on to invalidate the honoraria ban in all its applications to federal employees in the Executive Branch, whether or not such a nexus exists in a particular case or in a class of cases. In so holding, the court of appeals rendered a decision of far-reaching importance that affects millions of federal workers. That decision conflicts with this Court's precedents and warrants this Court's review.

1. Regulation of the speech of government employees is judged under a unique First Amendment test; a court's task is

employee' in its entirety from the statute, leaving the honorarium ban in place only as to Members of Congress." App., *infra*, 57a.

to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). A compelling reason for regulating expressive activity by government employees is to prevent actual or apparent impropriety. The citizenry must have confidence that the personnel responsible for the public's business are not subject to undue influence by private special interests. Accordingly, it is consistent with the First Amendment for Congress to take strong measures to protect the integrity and the appearance of integrity of the federal workforce, so long as the behavior it seeks to regulate may be "reasonably deemed by Congress to interfere with the efficiency of the public service." *United Public Workers v. Mitchell*, 330 U.S. 75, 101 (1947) (upholding the Hatch Act); *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 564-567 (1973) (same).⁵

a. In striking down the honoraria ban, the court of appeals departed from this Court's teachings. The court of appeals recognized that "the government has a strong interest in protecting the integrity and efficiency of public service and in avoiding even the appearance of impropriety created by abuse of the practice of receiving honoraria." App., *infra*,

⁵ It is important to notice that Section 501(b) does not prohibit any speech; it prohibits the receipt of honoraria as compensation for speech by those who have accepted the responsibility of federal employment (and who are paid for doing so). While removing a financial incentive to engage in expression does trigger First Amendment concern, see *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991), the character of the restriction in Section 501(b) is far less onerous than an outright ban on expression. As the court of appeals acknowledged, the "financial character" of the restriction is relevant to the "weight" of the employees' interest in the *Pickering* balance." App., *infra*, 6a.

6a. The court further noted that it could "safely assume * * * that the interest in avoiding the appearance of impropriety is strong enough to outweigh government employees' interest in engaging in speech for compensation *where the compensation creates such an appearance.*" *Ibid.* The court concluded, however, that the practice of receiving honoraria poses problems that justify a ban only when there is a "nexus between the employee's job and either the subject matter of the expression or the character of the payor"; only then is there "the sort of impropriety or appearance of impropriety at which the statute is evidently aimed." *Id.* at 9a.

Congress, however, could have "reasonably deemed" honoraria to pose a threat to the public's perception of the integrity of the federal workforce, whether or not a specific nexus can be shown. *United Public Workers v. Mitchell*, 330 U.S. at 101. The public is not likely to be aware of the full range of responsibilities of a particular employee, or whether the payor of the honorarium has a specific interest in a matter pending before a particular agency. Any payment for employee speech may therefore trigger citizen concern. The interest in eliminating *all* suspicion about the cause or effect of a particular honorarium justifies a flat ban, with no grey areas. The court of appeals erred by substituting its judgment for Congress's about when the receipt of honoraria may give rise to a possible appearance of taint.⁶

⁶ The court suggested that Congress needed to have concrete evidence "that the public actually perceives a risk of corruption in receipt by low-level government employees of remuneration for talks on topics that are wholly unrelated to their function, to audiences that are equally unrelated." App., *infra*, 13a. This Court, however, rejected virtually the same argument in the first Hatch Act case. In *United Public Workers v. Mitchell*, the Court held that Congress could seek to eradicate the problems caused by partisan political activity in the federal service, even among lower-level employees, without requiring Congress to adduce prior examples of abuse. 330 U.S. at 101-102.

Section 501(b) is also justifiable as a prophylactic measure. A complete and impermeable ban prevents the evasion that a more limited rule might invite. It also avoids the interpretational difficulties posed by officials in different agencies reviewing the contents of individual appearances, speeches, or articles to determine whether a prohibited nexus exists.⁷ Although the court of appeals acknowledged that this Court has sustained "broad prophylactic rules" that regulate employee activities, App., *infra*, 12a, citing *United Public Workers v. Mitchell*, *supra*, the court subjected Section 501(b) to a rigorous form of First Amendment scrutiny that few prophylactic rules could survive.⁸

The court observed that the government did not identify "any serious enforcement or line-drawing costs associated" with the prior system for regulating honoraria, which involved a form of nexus test. App., *infra*, 11a. There is no requirement, however, that Congress must build a record in the legislative history before enacting reasonable rules to regulate the conduct of federal employees. Congress need not wait until harms have actually materialized before eliminating a feared source of concern.

Nor is the validity of Section 501(b) called into question by the fact that Congress used a form of nexus test in Section 501(b) itself, banning honoraria for a "series of appearances,

⁷ Designated ethics officials in each covered agency are authorized to render advisory opinions to employees interpreting the honoraria ban as applied to particular facts. 5 U.S.C. App. 504(b) (Supp. IV 1992).

⁸ For the proposition that "a mere 'hypothetical possibility' of a corrupt 'exchange of political favors' is not enough" to support Section 501(b), App., *infra*, 12a, the court of appeals cited *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 498 (1985), and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). App., *infra*, 12a-13a. Both of those cases, however, examined fully protected political speech by private persons. They did not involve speech by government employees, which is judged under the more lenient *Pickering* balancing test.

speeches, or articles" only when "the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government." 5 U.S.C. App. 505(3) (Supp. IV 1992) (emphasis added). Congress's adoption of a nexus approach to a series does not require it to extend the same approach to all individual cases. Rather than suggesting that Congress "regards such [nexus] lines as entirely workable" in all contexts, App., *infra*, 12a, the special rule for a "series" of appearances, speeches, or articles can be explained by the different enforcement issues that arise in that context.⁹

b. Even if the court of appeals were correct in concluding that Section 501(b) has some unconstitutional applications, the court's remedy far exceeds the scope of the purported violation. The court acknowledged that "for some of § 501(b)'s applications—perhaps many of them—the *Pickering* balance supports its constitutionality." App., *infra*, 6a. Yet the court of appeals invalidated Section 501(b) in *all* its applications to Executive Branch employees—even where the government could readily demonstrate the existence of "some sort of nexus between the employee's job and either

⁹ Several factors distinguish honoraria for a series of appearances, speeches, or articles from individual instances of expression for pay. First, Congress "might reasonably have concluded" that repeated paid appearances before a particular group are "likely to be more open and more visible to the public (or the public's watchdogs) than * * * a one-time payment for a single appearance," and that "corruption is less likely under such circumstances." App., *infra*, 85a-86a (Williams, J., concurring in the denial of rehearing and rehearing en banc). Second, Congress may also have found that the larger volume of material involved in a "series" facilitates the judgment about whether a prohibited nexus exists. Third, because it is likely that relatively few employees engage in a "series" of paid appearances, speeches, or articles, requiring case-by-case review for nexus issues involving a series would present a far more manageable administrative task than if officials were required to review *all* individual instances of compensated speech by federal employees.

the subject matter of the expression or the character of the payor." *Id.* at 9a.

The sweeping relief ordered by the court of appeals is unjustified. The court began, soundly enough, by noting that it should invalidate no more of Section 501(b) than is necessary to remedy the constitutional flaw it discovered. App., *infra*, 14a. The court concluded, however, that it could not leave Section 501(b) in place as to applications in which the government *can* establish a nexus, because "[a]rticulation of some appropriate nexus test would seem a purely legislative act." *Ibid.* That analysis is incorrect. The court of appeals itself crafted a "nexus test" as an integral element of its First Amendment inquiry. *Id.* at 9a-10a. If the nexus concept serves to identify the *unconstitutional* applications of Section 501(b), as the court of appeals held, it also can serve to identify the *constitutional* applications of Section 501(b). The court, therefore, should have limited its decision to invalidating the application of Section 501(b) to cases in which there is no nexus between the speech for compensation and the employee's federal status, and left the remaining applications in force. There was no basis for invoking any form of "overbreadth" doctrine in this case, with the effect of invalidating clearly constitutional applications of the law. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); see also *Renne v. Geary*, 111 S. Ct. 2331, 2340 (1991); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503-507 (1985).

Limiting the invalidation of Section 501(b) to the actual applications of the law found to infringe First Amendment rights accords with this Court's treatment of similar issues. See *United States v. Grace*, 461 U.S. 171 (1983) (invalidating ban on expressive activity anywhere in the Supreme Court or its grounds only as applied to expressive activity on the sidewalk in front of the Supreme Court); *Edenfield v. Fane*, 113 S. Ct. 1792 (1993) (invalidating ban on all in-person solicitation of work by a certified public accountant only as

applied to solicitation in the commercial context). The court of appeals' broader ruling serves only to insulate from Section 501(b)'s remedial provisions speech that is concededly subject to regulation.¹⁰

2. The court of appeals' complete invalidation of Section 501(b) as applied to Executive Branch employees merits review—not only because it is incorrect, but also because the issue is important to Congress and to federal employees. The honoraria ban was not an afterthought to federal ethics legislation, but was in large measure a direct response to the reports of two prestigious commissions that had expressed concerns that the receipt of honoraria created an appearance of impropriety and undermined the confidence of citizens in the integrity of government.

The 1989 Quadrennial Commission on Executive, Legislative, and Judicial Salaries concluded that "[t]he potential for abuse or the appearance of abuse [from honoraria] is obvious to the public" and that public trust in members of Congress "is threatened by the steady growth of th[e] practice" of receiving honoraria; accordingly, the Commission "strongly recommend[ed] that the practice of accepting honoraria in all three branches be terminated by statute."¹¹ Similarly, the

¹⁰ Federal law contains other statutory and administrative restrictions on employee speech for compensation when it is related to federal status. See, e.g., 18 U.S.C. 201(b) and (c) (prohibiting solicitation or receipt of bribes or illegal gratuities); 18 U.S.C. 209 (1988 & Supp. IV 1992) (prohibiting receipt of compensation for government service or a supplementation of salary from a private party); 5 C.F.R. 2635.807 (specifying requirements for compensated teaching, speaking, and writing by federal employees). As a remedy for violations of Section 501(b), however, the government may recapture the unlawfully received compensation, 5 U.S.C. App. 504(a) (Supp. IV 1992), and that remedy is not necessarily available under other provisions.

¹¹ *Fairness for Our Public Servants: The Report of the 1989 Commission on Executive, Legislative and Judicial Salaries* 24 (Dec. 1988) (Quadrennial Commission report), reprinted at C.A. Joint Appendix 39.

Wilkey Commission, a blue-ribbon presidential panel on ethics reform, noted that "[h]onoraria paid to officials can be a camouflage for efforts by individuals or entities to gain the officials' favor," and it stated that "in the interest of alleviating abuses in the legislative branch and in applying equitable limitations across the government, * * * [the Wilkey Commission] joins the Quadrennial Commission in recommending the enactment of legislation to ban the receipt of honoraria by all officials and employees in all three branches of government."¹² The Wilkey Commission specifically concluded that the ban must be a comprehensive one to achieve its purpose: "To curtail the risk that individuals will find a way to circumvent these restrictions, the bar on honoraria necessarily needs to extend both to activities related to an individual's official duties and to other activities."¹³

In embracing the contemporaneous recommendations of two respected panels whose members had significant experience in public service, Congress adopted a policy that was intended to help restore public trust and confidence in the federal government. That policy has now been invalidated by the court of appeals' holding that the uniform honoraria ban that Congress enacted cannot withstand constitutional scrutiny. Under the court of appeals' holding, the Legislative and Judicial Branches, but not the Executive Branch, are subject to the honoraria ban. The issue of whether Congress's considered judgment must be overridden on First Amendment grounds merits this Court's attention.

¹² *To Serve With Honor: Report of the President's Commission on Federal Ethics Law Reform* 35-36 (Mar. 1989) (Wilkey Commission report), reprinted at C.A. Joint Appendix 139-140.

¹³ Wilkey Commission report at 36, C.A. Joint Appendix 140.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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JANUARY 1994

APPENDIX A

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

Nos. 92-5085, 92-5139, 92-5170, 92-5235,
92-5236 and 92-5237

NATIONAL TREASURY EMPLOYEES UNION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

NATIONAL TREASURY EMPLOYEES UNION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

PETER G. CRANE, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

NATIONAL TREASURY EMPLOYEES UNION, ET AL.

v.

UNITED STATES OF AMERICA, ET AL., APPELLANTS

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, ET AL.,

v.

UNITED STATES OF AMERICA, ET AL., APPELLANTS

PETER G. CRANE, ET AL.

v.

UNITED STATES OF AMERICA, ET AL., APPELLANTS

Argued Nov. 6, 1992
Decided March 30, 1993
As Amended April 8, 1993

Before: WILLIAMS, SENTELLE and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge STEPHEN F. WILLIAMS.

Concurring opinion filed by Circuit Judge RANDOLPH.

Dissenting opinion filed by Circuit Judge SENTELLE.

STEPHEN F. WILLIAMS, Circuit Judge:

In § 501(b) of the Ethics in Government Act, 5 U.S.C. app. § 501 *et seq.*, Congress provided that “[a]n individual may not receive any honorarium while that individual is a Member [of Congress, or] officer or employee [of the federal government].” Congress defined “honorarium” as “a payment of money or anything of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual’s official duties or the payment is made because of the individual’s

status with the Government) . . . excluding any actual and necessary travel expenses.” *Id.* § 505(3). The Office of Government Ethics has promulgated regulations implementing the Act for officers and employees of the executive branch. See 56 Fed. Reg. 1721 (January 17, 1991) (to be codified at 5 CFR § 2636.101ff.); 57 Fed. Reg. 601 (January 8, 1992) (amending 5 C.F.R. § 2636.-203).

Employees of the executive branch, and several unions of such employees, responded to enactment of the honorarium ban by challenging it in district court as a violation of their rights under the First Amendment. The National Treasury Employees Union was certified as the class representative for all affected executive branch employees below the grade of GS-16,¹ and the various cases were consolidated.

On cross motions for summary judgment, the district court found the ban a violation of the First Amendment in so far as it affected the speech of executive branch employees.² It enjoined enforcement, but stayed its judgment pending appeal. 788 F.Supp. 4. The government appeals from the judgment and injunction, and plaintiffs appeal from the stay. We affirm the judgment of the district court on the merits; this moots the problem of the stay.

* * *

Because the case involves a government burden on the speech of its own employees, *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed 2d 811 (1968), supplies the standard for judicial review of the congressional action. In *Pickering* a county had dismissed a teacher for

¹ All but one of the individually named challengers fall into this class; the one exception is Peter G. Crane, a GS-16 executive branch employee.

² Before the summary judgment decision, the district court denied a preliminary injunction. We affirmed the denial, *National Treasury Employees Union v. United States*, 927 F.2d 1253 (D.C. Cir. 1991).

publishing in a newspaper a letter criticizing the county school board's allocation of funds. While saying that the state could not make public employment conditional upon relinquishment of "the First Amendment rights [employees] would otherwise enjoy as citizens to comment on matters of public interest", *id.* at 568, 88 S.Ct. at 1734, the Court also said that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* It identified the "problem" as being "to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*

As *Pickering* defines the employees' speech interests in terms of "matter[s] of public concern", see also *Connick v. Myers*, 461 U.S. 138, 146-47, 103 S.Ct. 1684, 1689-90, 75 L.Ed.2d 708 (1983), we pause briefly to consider whether this case involves such matters. In *Connick* the Court spoke broadly of expression "relating to any matter of political, social, or other concern to the community." Viewing the idea of "public concern" in the abstract, one might suppose it excluded some of the topics on which plaintiffs have spoken or written—such as the technology of Civil War ironclads. See Joint Appendix ("J.A.") at 119.

But *Connick* makes clear that the "public concern" criterion does not require any great intensity or breadth of public interest in the subject. It is thus far broader than the sort of "public questions" in which a person must be involved for application of *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351, 94 S.Ct. 2997, 3012, 41 L.Ed.2d 789 (1974); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296 (D.C.Cir. 1980). In *Connick* the

employee had circulated a questionnaire asking fellow employees for their views on such matters as the level of office morale, their confidence in various supervisors and the need for a grievance committee. These the Court wrote off as "mere extensions of Myers' dispute over her transfer". 461 U.S. at 148, 103 S.Ct. at 1690. In contrast, it found a question on whether employees ever felt "pressured to work in political campaigns on behalf of office supported candidates" to be of interest to the community. *Id.* at 149, 103 S.Ct. at 1691. The contrast, then, was between issues of external interest as opposed to ones of internal office management. See also *id.* at 146, 103 S.Ct. at 1689 (invoking need for officials to "enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary"). Accordingly, we read the "public concern" criterion as referring not to the number of interested listeners or readers but to whether the expression relates to some issue of interest beyond the employee's bureaucratic niche. None of the samples of past or intended expression mentioned by plaintiffs involves such a parochial concern.

Although § 501(b) prohibits no speech, it places a financial burden on speech—denial of compensation. While the employees' First Amendment interest is therefore somewhat less weighty than under a flat ban, there can be no doubt that the burden counts for purposes of the *Pickering* balance. In *Simon & Schuster, Inc. v. New York State Crime Victims Board*, ___ U.S. ___, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991), the Supreme Court considered a statute that singled out compensation for writings by a person convicted or accused of a crime on the subject of his crime. Though at times seeming to characterize the statute as content-based, see, e.g., *id.* at ___, 112 S.Ct. at 508, the Court ultimately declined to say whether it was or not, and invalidated it as not "narrowly tailored" enough even under "the more lenient tailoring standards applied" to content-neutral provisions, *id.* at ___ - ___ n. **, 112

S.Ct. at 511-12 n. **. The point that the burden was simply denial of compensation played no apparent role in the Court's "tailoring" analysis. Similarly, the financial character of the limitation here affects only the "weight" of the employees' interest in the *Pickering* balance.

Neither party disputes that the government has a strong interest in protecting the integrity and efficiency of public service and in avoiding even the appearance of impropriety created by abuse of the practice of receiving honoraria. Indeed, in *Keefe v. Library of Congress*, 777 F.2d 1573, 1581 (D.C. Cir. 1985), we identified "prevent[ing] erosion of congressional and public confidence in the integrity of the [Congressional Research] Service" as a compelling justification for limits on its analysts' participation in political activities. We can safely assume for the purposes of this opinion that the interest in avoiding the appearance of impropriety is strong enough to outweigh government employees' interest in engaging in speech for compensation *where the compensation creates such an appearance*, and so is strong enough to justify a ban on compensation in those circumstances. Thus, for some of § 501(b)'s applications—perhaps many of them—the *Pickering* balance supports its constitutionality.

That conclusion will not save § 501(b), however, if it either is "overbroad" or manifests a want of "narrow tailoring." Plaintiffs in their attack on the statute use the terms more or less interchangeably. So has the Supreme Court, on occasion, when speaking of the substance of the doctrines, i.e., what they demand of a statute in terms of focus on a genuine evil. Thus in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), the Court started its analysis of the subject by posing the question whether the statute was "sufficiently narrowly tailored to achieve its goal", *id.* at 660, 110 S.Ct. at 1397, and ended by finding that it was "not substantially overbroad", *id.* at 661,

110 S.Ct. at 1398. See also *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 965-66 n. 13, 104 S.Ct. 2839, 2851-52 n. 13, 81 L.Ed.2d 786 (1984) (" 'Overbreadth' has also been used to describe a challenge to a statute that . . . does not employ means narrowly tailored to serve a compelling government interest"); cf. *Simon & Schuster, Inc. v. New York State Crime Victims Board*, ___ U.S. at ___, 112 S.Ct. at 511-12 (addressing whether law "is significantly overinclusive" and concluding that it "is . . . not narrowly tailored to achieve the State's objective"). Moreover, the terms used by the Court to describe the doctrines' substance do not seem to suggest a material difference. As to overbreadth, the Court said in *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973), "[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real [i.e., not based on speculative constructions of the statute] but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615, 93 S.Ct. at 2917. And in its most explicit treatment of narrow tailoring, *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), it said:

[T]he requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." . . . To be sure, this standard does not mean that a . . . regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.

Id. at 799, 109 S.Ct. at 2758 (citations and footnote omitted). Although *Ward* involved a time, place, and manner restriction, the Court has since indicated that this concept of "tailoring"

applies to any content-neutral restriction on speech. See *Simon & Schuster*, ___ U.S. at ___ n. **, 112 S.Ct. at 511 n. **. Thus both doctrines invalidate a statute that imposes “substantial” burdens that are not supported by the statute’s justifications; i.e., both invalidate statutes that are unduly “overinclusive.”

Conceivably the quality of fit demanded by the two doctrines differs. The Court has stressed that overbreadth is “strong medicine”, *Broadrick*, 413 U.S. at 613, 93 S.Ct. at 2916, possibly suggesting that a plaintiff can prevail under that doctrine only by showing more drastic overinclusiveness than would be necessary to prevail on a narrow tailoring claim. Such a view might make some sense, as overbreadth (in its classic form) gives the plaintiff a procedural advantage—the ability to challenge a statute on the basis of its effect on others—see, e.g., *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 60 S.Ct. 736, 741-742, 84 L.Ed. 1093 (1940); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796-98, 104 S.Ct. 2118, 2124-25, 80 L.Ed.2d 772 (1984); *Board of Trustees v. Fox*, 492 U.S. 469, 482-83, 109 S.Ct. 3028, 3035-36, 106 L.Ed.2d 388 (1989)—in exchange for which he might be expected to surmount an exceptional substantive hurdle. But, as developed below, we cannot see that § 501(b) satisfies even the most lenient form of the requirement.

Although the Supreme Court has occasionally suggested that courts may proceed to consider a facial overbreadth challenge only after having determined that it is valid as applied to the challengers, see, e.g., *Fox*, 492 U.S. at 484-85, 109 S.Ct. at 3037, in fact the Court allows facial overinclusiveness claims by parties whose conduct may well be constitutionally protected—such as many of the plaintiffs here. In *Austin v. Michigan Chamber of Commerce*, for example, the Chamber of Commerce mounted a pre-enforcement facial challenge to a state restriction on corporate political expenditures, maintaining that its speech was in fact pro-

tected. 494 U.S. at 661-65. Yet the Court addressed the facial attack on the statute’s scope.³ See also *New York State Club Ass’n v. New York City*, 487 U.S. 1, 13-15, 108 S.Ct. 2225, 2234-35, 101 L.Ed.2d 1 (1988) (applying standard overbreadth analysis without even considering whether members of the Association could be legitimately subject to the ordinance); *Boos v. Barry*, 485 U.S. 312, 329-32, 108 S.Ct. 1157, 1168-69, 99 L.Ed.2d 333 (1988) (applying overbreadth analysis without either a concession by plaintiffs that their speech could be constitutionally restricted or a finding to that effect, and indeed in the face of indications that they claimed their speech was protected, see *id.* at 315-16, 108 S.Ct. at 1160-61), affirming in relevant part *Finzer v. Barry*, 798 F.2d 1450, 1472 (D.C.Cir. 1986) (addressing facial attack on the statute’s scope in the face of the challengers’ assertion that their speech was protected); but cf. *Sanjour v. EPA*, 984 F.2d 434, 444 & n. 10 (D.C.Cir. 1993).

Accordingly we reach the merits of the plaintiffs’ overinclusiveness claims. To create the sort of impropriety or appearance of impropriety at which the statute is evidently aimed, there would have to be some sort of nexus between the employee’s job and either the subject matter of the expression or the character of the payor. But as to many of the plaintiffs, the government identifies no such nexus. These plaintiffs include a Nuclear Regulatory Commission lawyer who writes on Russian history of the late Romanov era, see J.A. at 51; a Postal Service mailhandler who writes and gives speeches on the Quaker religion, *id.* at 63; a Department of Labor lawyer who lectures on Judaism, *id.* at 70; a Department of Health and Human Services employee who reviews art, musical, and

³ Although the Court in *Austin* ultimately rejected the Chamber’s claim that its conduct was protected, 494 U.S. at 661-65, 110 S.Ct. at 1398-1400, the sequence in which the Court addressed the matter is inconsistent with the idea that facial overinclusiveness claims can only be raised by parties whose conduct is not protected.

theater performances for local newspapers, *id.* at 95; and a civilian Navy electronics technician who writes on Civil War ironclad vessel technology, *id.* at 119. The topics appear not to be such that the employee could have used information acquired in the course of his government work; there is no suggestion of any use of government time, word processors, paper or ink; there is no suggestion that the institutions that have paid or are likely to pay for the speeches or writings would have some relationship with the employee's agency that would make them wish to curry its favor.

Of course the ban also covers payments for speeches and articles that may well create an appearance of impropriety. In fact, even some of the plaintiffs receive payments that might at least raise an eyebrow. For example, a business editor at the Voice of America also receives payment for business analysis that he provides various media. J.A. 57-62. From his own account it seems at least quite possible that he uses information acquired on the job; and it is possible that the media to whom he sells might believe that his favor could improve the chances that VOA would use some of their materials. (The editor suggests that banning compensation for his writings and talks will make government service far less attractive to hard-working, intelligent, creative persons. Surely this is so. We do not here address whether such values might count in the *Pickering* balance.) Another plaintiff is a GS-7 "tax examining assistance". See J.A. 85-86. In view of the universality of citizens' subjection to the Internal Revenue Service, we can understand some anxiety about receipt of payment by such an employee. However, even assuming *arguendo* that § 501(b) could be lawfully applied to these last two plaintiffs, it is clear that the ban reaches a lot of compensation that has no nexus to government work that could give rise to the slightest concern.⁴

⁴ The presence of some permissible applications of the statute that are "easily identifiable" does not immunize a statute from facial invalida-

There remains the possibility that these apparent excesses might be legitimized by the enforcement difficulties—including the problem of government scrutiny of subject matter—that any narrower restriction would involve. (Ironically, one plaintiff objects to even the screening that is involved in enforcement of § 501(b). J.A. 64.) If manageable lines are available to limit the ban to genuinely troubling compensation, then excesses, even if they affected few speakers, would appear gratuitous.

In fact, however, the government points neither to improprieties in the pre—§ 501(b) era that would have been prevented by § 501(b) but not by the prior regulations, nor to any serious enforcement or line-drawing costs associated with those regulations. Cf. *Boos v. Barry*, 485 U.S. at 324-29, 108 S.Ct. 1165-68 (stating that the "most useful starting point" for assessing whether a statute is narrowly tailored is to "compare it with an analogous statute"). As summarized in testimony before the Senate Committee on Governmental Affairs, the prior regulations allowed honoraria so long as the speaker or writer held a rank lower than GS-16 and all of the following questions could be answered negatively:

tion. Compare Dissent at 7-8. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984), says only that a statute may not be invalidated as overbroad when, "despite some possibly impermissible application, the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct." *Id.* at 964-65, 104 S.Ct. at 2850-51 (citations and ellipses omitted). Similarly, *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973), holds only that when the threat to protected speech is limited, and the statute covers "a whole range of easily identifiable and constitutionally proscribable" conduct, the statute is not substantially overbroad. *Id.* at 580-81, 93 S.Ct. at 2897-98. Both these cases contrast very limited risks of invalid encroachments on speech with a broad range of permissible applications—not the situation we face in this case, in which the scope of the invalid applications is large.

(1) Is the honorarium offered for carrying out government duties or for an activity that focuses specifically on the employing agency's responsibilities, policies and programs?

(2) Is the honorarium offered to the government employee or family member because of the official position held by the employee?

(3) Is the honorarium offered because of the government information that is being imparted?

(4) Is the honorarium offered by someone who does business with or wishes to do business with the employee in his or her official capacity?

(5) Were any government resources or time used by the employee to produce the materials for the article or speech or make the appearance?

S. Rep. No. 29, 102d Cong., 1st Sess., at 8 (1991). While some of the limits may have an amorphous quality about them (such as the one purporting to probe the motive of the honorarium's offeror), there appears no actual experience of difficulty, and one can hypothesize rules of thumb that could constrain government discretion. Indeed, Congress's use of similar criteria to cover a "series of appearances, speeches, or articles", which § 501(b) as amended allows unless "the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government", suggests that it regards such lines as entirely workable.

While no one questions the authority of Congress to enact broad prophylactic rules, see *United Public Workers v. Mitchell*, 330 U.S. 75, 102, 67 S.Ct. 556, 570, 91 L.Ed. 754 (1947), a mere "hypothetical possibility" of a corrupt "exchange of political favors" is not enough. *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 498, 105 S.Ct. 1459, 1469, 84 L.Ed.2d 455 (1985); see also *id.* at 500-01,

105 S.Ct. at 1470 (government evidence trying to link corruption to independent expenditures by PACs fails to pass "rigorous" First Amendment standard of review); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789, 98 S.Ct. 1407, 1422, 55 L.Ed.2d 707 (1978). Of course where it is in the nature of the evil to be averted that it will be concealed, the court will necessarily expect less evidence. Thus, in upholding the Hatch Act, 5 U.S.C. § 7324 *et seq.*, the Court pointed out that one important concern was to ensure that "Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs." *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 13 U.S. 548, 566, 93 S.Ct. 2880, 2890, 37 L.Ed.2d 796 (1973). The potential for such subtle pressure is not only pervasive but inherently difficult to demonstrate or assess; thus, the absence of episodes coming to light is quite consistent with the congressional concern. Similarly, in *Buckley v. Valeo*, 424 U.S. 1, 26-27, 96 S.Ct. 612, 638, 46 L.Ed.2d 659 (1976), the Court noted that "the full scope of such pernicious practices [as political *quid pro quos* for large campaign contributions] can never be reliably ascertained," and then went on to observe that "deeply disturbing examples" of such arrangements had surfaced in the 1972 elections. Evidently the Court believed that the surreptitious character of a possible evil could explain the absence of evidence, at least if the evil's existence could reasonably be inferred (as from human nature and the character of the political process). In contrast, here the government does not suggest that the public actually perceives a risk of corruption in receipt by low-level government employees of remuneration for talks on topics that are wholly unrelated to their function, to audiences that are equally unrelated. Nor does it suggest any reason to infer the likelihood of such

perceptions, nor any reason why we would not see evidence of such perceptions if they existed.

As the apparently excess sweep of § 501(b) is supported by no more than the theoretical possibilities viewed as inadequate in *National Conservative Political Action Committee*, we cannot find § 501(b) “narrowly tailored”.⁵

* * * * *

Our final step is to determine the proper remedy. In general, a court should “refrain from invalidating more of the statute than is necessary.” *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684, 107 S.Ct. 1476, 1479, 94 L.Ed.2d 661 (1987) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S.Ct. 3262, 3268, 82 L.Ed.2d 487 (1984) (plurality opinion)). But the language of § 501(b)—“[a]n individual may not receive *any* [payment for an appearance, speech or article]” (emphasis added)—does not seem to admit of any construction that would trim off all or even most of the invalid applications to executive branch employees; indeed the government proposes no limiting construction. Articulation of some appropriate nexus test would seem a purely legislative act.

This leaves open the possibility, however, that § 501(b)’s application to executive branch employees may be severable from the remainder of the statute. No party here has argued that § 501(b) is unconstitutional as applied to members of Congress, officers or employees of Congress, or judicial officers or employees, and any such claim would raise quite different considerations. Legislators and judges and their staffs are likely to have to deal with a wide range of issues, so that a party purportedly paying for speech or writing by any of them is more likely to anticipate gaining some advantage, or at least to be *seen* as hoping for such an advantage. The trade-off

⁵ Because § 501(b) is unconstitutional for want of narrow tailoring, we do not reach the argument that it is unconstitutionally underinclusive.

between preventing excess applications and keeping administrative costs low would be different from what it is for executive branch employees.

Whether an unconstitutional provision is severable “is largely a question of legislative intent, but the presumption is in favor of severability.” *Regan v. Time, Inc.*, 468 U.S. at 653, 104 S.Ct. at 3269. “‘Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.’” *Buckley v. Valeo*, 424 U.S. at 108-09, 96 S.Ct. at 677 (quoting *Champlin Refining Co. v. Corporation Comm’n of Oklahoma*, 286 U.S. 210, 234, 52 S.Ct. 559, 564, 76 L.Ed. 1062 (1932)).

Section 501(b) does not contain a severability clause, and the legislative history yields no direct evidence of intent concerning severability. Thus, we must ask whether there is anything in the history indicating that Congress would have enacted the honorarium ban if it had been aware of its unconstitutionality as applied to executive branch employees. *Alaska Airlines, Inc. v. Brock*, 480 U.S. at 685, 107 S.Ct. at 1480.

In this case the evidence is that it clearly would have gone forward as to the legislative branch and in all probability as to the judicial. First, the floor debates indicate that Congress was principally concerned that the receipt of honoraria by Members of Congress created the appearance of influence-buying. Speakers throughout the debates refer to “Members of Congress” in explaining why the honorarium ban was necessary. See, e.g., 135 Cong.Rec. H8756 (daily ed. Nov. 16, 1989). For example, at one point a congressman noted that “the elimination of honoraria will have a beneficial impact on the public’s perception of *the integrity of Congress as an institution*.” *Id.* at H8763 (emphasis added). Another congressman noted that the statute addressed “the underlying sources of abuse in the current income system for public employees, *in*

particular for Members of Congress.” *Id.* at H8767 (emphasis added).

Similarly, the Report of the Bipartisan Task Force, issued after the Act was passed, also indicates a primary concern with the receipt of honoraria by Members of Congress. In describing the background of the ban the report states that “substantial payments to a Member of Congress for rendering personal services to outside organizations presents a significant and avoidable potential for conflict of interest.” *Id.* at H9256. The report continues by describing how the increase in Members’ honoraria income in recent years “has heightened the public perception that honoraria is [sic] a way for special interests to try to gain influence or buy access to Members of Congress,” *id.* at H9257, and noting the “growing concern that the practice of acceptance of honoraria by Members . . . creates serious conflict of interest problems and threatens to undermine the institutional integrity of Congress.” *Id.* Nowhere did members of Congress display any specific concern with the receipt of honoraria by executive branch employees, much less indicate that the application of the ban to them was a condition of the bill’s passage.

Further, the honorarium ban was adopted as part of a package of which a key ingredient was a sharp increase in the salary of members of Congress, judges, and a limited class of senior executive branch officials. See *id.* at H9254, H9268-69 (describing Title III of the Act). The one clearly detectable interdependency between segments of the statute was between the ban and the salary increase. See, e.g., *id.* at H8756 (statement of Congressman Packard); *id.* at H8766/1-2; *id.* at H8767; *id.* at H9254 (stating that the pay raise would be given “as part of the ban on honoraria”). Striking down the application of the honorarium ban as to members of Congress and judges—while leaving their salary increases in place (a constitutional necessity for the latter)—would truly violate the intent of Congress.

Nominally, the invalidation of the honorarium ban as to executive branch employee upsets some of the intended balance (the salary increase for senior officials survives, the honorarium ban falls). But as other, severe restrictions have applied to senior executive branch officials anyway, see, e.g., E.O. 12674 (April 12, 1989)⁶ (providing that “[no] employee who is appointed by the President to a full-time noncareer position in the executive branch . . . shall receive any earned income for any outside employment or activity performed during that Presidential appointment”), the effect on senior officials benefitting from the salary increase may well be nil.

We cannot, as a technical matter, achieve the intended severance simply by striking the words “officer or employee” from § 501(b), as that would invalidate the ban beyond the executive branch. See § 505(3) (defining “officer or employee” as “any officer or employee of the government”, and in context indisputably encompassing employees of Congress and judicial officers and employees). However, given the far greater congressional interest in banning honoraria for the legislative and judicial branches, we think it a proper form of severance to strike “officer or employee” from § 501(b) *except* in so far as those terms encompass members of Congress, officers and employees of Congress, judicial officers and judicial employees. Compare 5 U.S.C. app. 6, § 101(f)(9)-(12) (definition of “officers and employees” in related ethics legislation, encompassing persons in all three branches but distinguishing between them). This severance is similar to the type employed by the Court in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985). There the Court “pretermi[ed]” the issue of whether “lust” might be *construed* as referring only to morbid and shameful

⁶ 54 Fed.Reg. 15159, § 102, as amended by E.O. 12731 (October 7, 1990), 55 Fed.Reg. 42547, § 102.

interests (rather than also encompassing “‘good, old-fashioned, healthy’ interest in sex”), *id.* at 498-501, 105 S.Ct. at 2798-2800, and instead *severed* from the statute any meaning of lust other than shameful and morbid interests, *id.* at 506-07, 105 S.Ct. at 2803.

The decision of the district court is
Affirmed.

RANDOLPH, Circuit Judge, concurring:

I join fully Judge Williams’ opinion. I write separately because it seems worth pointing out that the dissent has mixed up two different questions: who may bring a facial constitutional challenge to a statute? and when may such a challenge succeed? The first goes to standing, the second to the merits. Established Supreme Court doctrine on both questions depends on whether the facial attack rests on First Amendment free-speech grounds. If it does, the plaintiff need not show that his speech deserves First Amendment protection; he has standing to contest the statute’s constitutionality with respect to the speech of others. *See, e.g., New York v. Ferber*, 458 U.S. 747, 767-73, 102 S.Ct. 3348, 3359-63, 73 L.Ed.2d 1113 (1982); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634, 100 S.Ct. 826, 834, 63 L.Ed.2d 73 (1980); *Gooding v. Wilson*, 405 U.S. 518, 520-21, 92 S.Ct. 1103, 1105, 31 L.Ed.2d 408 (1972). As far as the merits are concerned, the usual rule is that a facial attack will not be sustained unless there is no set of circumstances in which the statute could constitutionally be applied. *See, e.g., United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987); *National Fed’n of Fed. Employees v. Greenberg*, 983 F.2d 286, 292 (D.C.Cir. 1993). In free-speech cases, the rule, an aspect of the “overbreadth” doctrine, is nearly the opposite: a statute is invalid in all its applications if

it is invalid in any of them, or at least enough to make it “substantially” overbroad. *See, e.g., Federal Election Comm’n v. National Conservative Political Action Comm.*, 470 U.S. 480, 490-501, 105 S.Ct. 1459, 1465-70, 84 L.Ed.2d 455 (1985); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 786-95, 98 S.Ct. 1407, 1421-26, 55 L.Ed.2d 707 (1978); *Buckley v. Valeo*, 424 U.S. 1, 44-51, 96 S.Ct. 612, 646-50, 46 L.Ed.2d 659 (1976) (per curiam). The dissent garbles these distinctions and winds up with the following untenable proposition—if the parties before the court are alleging that the statute unconstitutionally restricts *their* freedom of speech, rather than the speech of absent third parties, the statute is unconstitutional on its face only if it is unconstitutional in all its applications to them. In other words, § 501(b) of the Ethics in Government Act would be facially invalid if the only plaintiff were a GS-14 Labor Department employee making money from articles about government labor policy. But in this case it is not facially unconstitutional, according to the dissent, because everyone to whom the statute could be unconstitutionally applied is before the court. This is the equivalent of saying that if you would not have had standing in a non-free speech case, you win on the merits; but if you have standing even under the usual rules, you lose.

As to the analysis under *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), the dissent thinks the ban on federal employees’ receiving payment for writing articles imposes a “moderate burden *at most*.” Dr. Johnson saw things rather differently: “No man but a blockhead ever wrote, except for money.” 4 BOSWELL’S LIFE OF JOHNSON 29 (A. Birrell ed. 1904). Depending on what constitutes a blockhead, the aphorism may be tautological or too broad. Boswell himself had his doubts (*id.*). But the general proposition—that depriving authors of payment for their works significantly discourages writing—is one of the

premises of the Supreme Court's decision in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, ___ U.S. ___, ___, ___, 112 S.Ct. 501, 508-09, 511-12, 116 L.Ed.2d 476 (1991); see also ___ U.S. at ___, 112 S.Ct. at 512 (Kennedy, J., concurring). If *Sanjour v. Environmental Protection Agency*, 984 F.2d 434 (D.C.Cir. 1993), stands for a different proposition, or if it too confuses the merits with standing and ignores the differences between facial attacks based on the First Amendment and those based on other constitutional provisions, it warrants reconsideration.

SENTELLE, Circuit Judge, dissenting:

Although I share my colleagues' concerns that this statute may not be the best conceivable vehicle for achieving the underlying congressional aim, I dissent from their conclusion that it is unconstitutional. My dissent rests both on concerns about the precedent the Court creates today and on what I perceive to be its inconsistency with existing precedent, both of the Supreme Court and this Circuit.

I address first the inconsistency of the Court's holding today with existing law on facial challenges; second, the application of the *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), standard to the question of the constitutionality of the honorarium ban; and, third, my discreet disagreement with the "severance" exercised by the majority on the statutory term "officer or employee."

I.

I fear that the majority opinion may lead litigants to conclude that whenever a statute is unconstitutional "as applied" to parties before the court it is also "facially" invalid. See Majority Opinion ("Maj. Op.") at 1275 & n. 3 (sustaining appellees' facial challenge because the statute is unconstitu-

tionally overbroad as to them and "the [Supreme] Court allows facial overinclusiveness claims by parties whose conduct may well be constitutionally protect"). In fact, though it is often the case, as in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), for example, that a plaintiff who asserts the unconstitutionality of a statute as applied to him is also heard to challenge the statute on its face, see *Sanjour v. EPA*, 984 F.2d 434, 444 n. 10 (D.C.Cir. 1993); *National Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286, 288 (D.C.Cir. 1993), that truism does *not* mean that facial challenges may be entertained and sustained without limitation.

Instead, the Supreme Court has held that statutes may be facially invalidated only in two "narrow" circumstances. As the Court in *New York State Club Ass'n v. New York City*, 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988), recently made clear:

Although such facial challenges are sometimes permissible and often have been entertained, . . . to prevail on a facial attack the plaintiff must demonstrate that the challenged law either "could never be applied in a valid manner" or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it "may inhibit the constitutionally protected speech of third parties."

Id. at 11, 108 S.Ct. at 2233 (quoting *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798, 104 S.Ct. 2118, 2125, 80 L.Ed.2d 772 (1984)).

New York State Club Ass'n also teaches that different substantive criteria govern each of the two categories of permissible facial challenges. "[T]he first kind of facial challenge will not succeed unless the court finds that 'every application of the statute create[s] an impermissible risk of suppression of

ideas.' " *Id.* (quoting *Taxpayers for Vincent*, 466 U.S. at 798 n. 15, 104 S.Ct. at 2125 n. 15). On the other hand, "the second kind of facial challenge will not succeed unless the statute is 'substantially' overbroad, which requires the court to find 'a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.' " *Id.* (quoting *Taxpayers for Vincent*, 466 U.S. at 801, 104 S.Ct. at 2126). Neither type of facial challenge, however, succeeds unless "there is no care of easily identifiable and constitutionally proscribable conduct that the [challenged] statute prohibits." *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 965-66, 104 S.Ct. 2839, 2851-52, 81 L.Ed.2d 786 (1984); see also *Sanjour v. EPA*, 984 F.2d 434, 444 & n. 11 (D.C.Cir. 1993) (same).

Limiting facial challenges in this manner may seem to manifest an excessive focus on semantics or an outright hostility to constitutional rights. But, as the Supreme Court has explained, the limits on permissible facial challenges "rest on more than the fussiness of judges." *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S.Ct. 2908, 2914, 37 L.Ed.2d 830 (1973). They are, quite simply, a requirement of the limitations inherent in Article III. "[U]nder our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Id.* at 611, 93 S.Ct. at 2915 (citing *Younger v. Harris*, 401 U.S. 37, 52, 91 S.Ct. 746, 754, 27 L.Ed.2d 669 (1971)). Stated differently, "[t]he judicial power does not extend to issuing 'an opinion advising what the law would be upon a hypothetical state of facts.' " *American Library Ass'n v. Barr*, 956 F.2d 1178, 1189 (D.C.Cir. 1992) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937)).

Moreover, far from disadvantaging constitutional rights, these limits reflect a sensible accommodation of constitutional rights and the legitimate interest of government. Generally

speaking, the Supreme Court has deemed as-applied challenges sufficient to protect precious constitutional rights. See *Broadrick*, 413 U.S. at 611, 93 S.Ct. at 2915. If a plaintiff demonstrates that a law impermissibly encroaches on protected activities, courts "invalidate[] the statute, not *in toto*, but only as applied to those activities," and thereby "[t]he law is refined by preventing improper applications on a case-by-case basis." *Munson*, 467 U.S. at 977, 104 S.Ct. at 2857 (Rehnquist, J., dissenting). That approach, in sharp contrast to facial invalidation, has the advantage of allowing statutes to stand as to the legitimate objects of legislative action while simultaneously exempting constitutionally protected activity from the statutes' reach. *Id.*

Only in two circumstances, representing the two exceptions elucidated in *New York State Club Ass'n*, has the Supreme Court found no justification for limiting plaintiffs to as-applied challenges. The first is review of a statute that has no constitutional application. Allowing facial challenges in that situation rests on the sound notion that "there is no reason to limit challenges to case-by-case 'as-applied' challenges when the statute . . . in all of its applications falls far short of constitutional demands." *Munson*, 467 U.S. at 966 n. 13, 104 S.Ct. at 2852 n. 13. The second arises when a statute is so overbroad as to the rights of absent third parties that "there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits." *Id.* at 965-66 n. 13, 104 S.Ct. at 2851-52 n. 13; see also *id.* at 964-65, 104 S.Ct. at 2850-51. In such a situation, as-applied challenges have been viewed as insufficient to protect First Amendment rights because such a law's "very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick*, 413 U.S. at 612, 93 S.Ct. at 2915.

In view of the existing precedent, a lower court addressing a facial challenge based on insufficient tailoring can hardly

avoid distinguishing between the two types of facial challenges.¹ In my view, the present challenge fits neither category, and that forecloses us from striking down the honorarium ban on its face. Quite clearly, appellees' facial challenge cannot succeed as a claim that the honorarium ban is unconstitutional in all of its possible applications. As the majority states, "[n]o party here has argued that § 501(b) is unconstitutional as applied to members of Congress, officers or employees of Congress, or judicial officers or employees." Maj. Op. at 1278. Indeed, appellees' brief expressly disclaims any claim that the ban is unconstitutional as to all those affected: "Plain-

¹ It is true that the Supreme Court has occasionally entertained facial challenges based on lack of tailoring without distinguishing between the two types of facial challenges. See, e.g., *Simon & Schuster v. Members of the New York State Crime Victims Bd.*, ___ U.S. ___, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) (sustaining facial challenge to New York's "Son of Sam" law as not narrowly tailored); *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990) (upholding as narrowly tailored, and therefore rejecting facial challenge to, Michigan's statutory limitation on corporate contributions to candidates for state office). In some of these cases it was unnecessary for the Court to make that distinction; for example, the Court's conclusion in *Austin* that the challenged statute was narrowly tailored rendered the precise nature of the plaintiffs' facial challenge academic.

Admittedly, in other tailoring cases where the precise nature of the facial challenge was unclear, the Court failed to reconcile its decisions with the *New York State Club Ass'n* framework. That fact, however, does not give us license to ignore that framework. See *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 896 (D.C.Cir. 1992) (harmonizing conflicting lines of Supreme Court cases even though cases in each line sometimes ignored the other line), *petition for cert. filed*, 61 U.S.L.W. 3523 (U.S. Jan. 13, 1993) (No. 92-1190). Certainly, prior decisions of this Court have taken pains to distinguish between the two types of facial challenges. See, e.g., *Sanjour v. EPA*, 984 F.2d 434, 440 (D.C.Cir. 1993); *Federal Election Comm'n v. International Funding Inst., Inc.*, 969 F.2d 1110, 1118 (D.C.Cir. 1992) (*en banc*), *cert. denied*, ___ U.S. ___, 113 S.Ct. 605, 121 L.Ed.2d 540 (1992); *American Library Ass'n v. Barr*, 956 F.2d 1178, 1190 (D.C.Cir. 1992).

tiffs are career executive branch employees, and they express no opinion as to the constitutionality of the honoraria ban as applied to Members of Congress, the judiciary, and high-level political appointees in the executive branch." Appellees' Br. at 36 n. 21.

Nor, for two reasons, does the appellees' facial challenge fall within the second category of permissible facial challenges. First, appellees' tailoring challenge does not constitute a cognizable overbreadth challenge under the second type of facial challenge. A court "may not apply overbreadth analysis to a claim 'that [a] statute is overbroad precisely because it applies to him—the plaintiff who is before us.'" *Sanjour*, 984 F.2d at 443 (quoting *Moore v. City of Kilgore*, 877 F.2d 364, 390-92 (5th Cir.), *cert. denied*, 493 U.S. 1003, 110 S.Ct. 562, 107 L.Ed.2d 557 (1989)). In so holding, *Sanjour* gave effect to the Supreme Court's explicit holding that "the second kind of facial challenge will not succeed unless the statute is 'substantially' overbroad, which requires the court to find 'a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.'" *New York State Club Ass'n v. New York City*, 487 U.S. 1, 11, 108 S.Ct. 2225, 2233, 101 L.Ed.2d 1 (1988) (quoting *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772 (1984)) (emphasis added).²

² The following exchange at oral argument between counsel for NTEU and one of my colleagues in the majority is relevant in this regard:

THE COURT: What I find odd is—you are making an "overbreadth" challenge—

COUNSEL: Sure, both overbreadth and as-applied.

THE COURT: With respect to your overbreadth challenge, you want to make it, "it's overbroad as applied to us." . . . You don't want to argue about anyone else, which is an odd, odd [kind of overbreadth challenge]. . . . Is there any case that you know of, any Supreme Court or court of appeals case, where you have a restricted class making an overbreadth challenge only with respect to them?

Here, appellees do not argue that the honorarium ban will compromise the rights of *absent* third parties. The parties whose rights are being asserted—Executive Branch employees below GS-16 and the individually named plaintiffs—are before the Court.³ The District Court properly certified appellee NTEU to represent the class in question under Rule 23(b)(2) of the Federal Rules of Civil Procedure. Given the nature of a class action, all of the members of the class—not just the class representative—are before the Court. *See* FED. R. CIV. P. 23(c)(3) (providing that “[t]he judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include . . . members of the class”) (emphasis added); *see generally* 7B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1789, at 247 (1986) (explaining that “a member of the class in a Rule 23 suit is considered to be a party in representation, and will be bound to the same extent as an actual party”).⁴ Conse-

COUNSEL: I can't think of one off the top of my head.

Tr. of Oral Arg. (Nov. 6, 1992). Counsel's inability to think of such a case is no accident, in view of the precedents discussed in the text.

³ The plaintiffs appearing individually and asserting their own rights are: (1) Peter G. Crane; (2) National Treasury Employees Union (“NTEU”) Chapter 143; (3) David E. Hubler; (4) the American Federation of Government Employees, AFL-CIO (“AFGE”); (5) Richard Deutsch; (6) Charles Fager; (7) William H. Feyer; (8) Robert Gordon; (9) Judith L. Hanna; (10) George J. Jackson; (11) Eduard Mark; (12) Arnold A. Putnam; (13) Jan Adams-Grant; and (14) Thomas C. Fishell. Each of the individually named plaintiffs filed suits in their own behalf and thus are obviously before us.

⁴ “The obvious implication of Rule 23(c)(3) is that anyone properly listed in the judgment should be bound by it absent some special reason for not doing so.” 7B CHARLES A. WRIGHT ET AL., *supra*, at 244; *see also*, e.g., *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 367, 41 S.Ct. 338, 342, 65 L.Ed. 673 (1921) (stating that “[i]f the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented”).

quently, we have before us, not just the individually named plaintiffs, but *all* Executive Branch employees below GS-16.

At no time in this litigation have the rights of anyone other than the individually named plaintiffs and the certified class been asserted. As a result, appellees' “overbreadth” challenge is based exclusively on a claim that the honorarium ban is overbroad precisely because it applies to them, and the instant case involves the assertion of first-party rights of parties presently before the Court. Appellees' facial challenge, therefore, fails on the merits, in view of controlling precedent from the Supreme Court and this circuit which place cases such as this one outside the substantive bounds of the second type of facial challenge, *i.e.*, the First Amendment overbreadth doctrine. *See New York State Club Ass'n v. New York City*, 487 U.S. 1, 11, 108 S.Ct. 2225, 2233, 101 L.Ed.2d 1 (1988) (holding that a claim under the First Amendment overbreadth doctrine “will not succeed unless . . . the [challenged] statute itself will significantly compromise recognized First Amendment protections of parties not before the Court”); *Sanjour v. EPA*, 984 F.2d at 442 (D.C.Cir. 1993) (same); *see also Moore v. City of Kilgore*, 877 F.2d 364, 390-92 (5th Cir.) (same), *cert. denied*, 493 U.S. 1003, 110 S.Ct. 562, 107 L.Ed.2d 557 (1989). By applying the overbreadth doctrine to appellees' facial challenge, the majority has loosed the overbreadth doctrine from its moorings, in direct contravention of the Supreme Court's pointed admonition that “[t]he scope of the First Amendment overbreadth doctrine . . . must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted.” *New York v. Ferber*, 458 U.S. 747, 769, 102 S.Ct. 3348, 3361, 73 L.Ed.2d 1113 (1982).

Second, under *Sanjour v. EPA*, 984 F.2d 434 (D.C.Cir. 1993), and the cases on which it relied,⁵ facial invalidation is

⁵ *See Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 965, 104 S.Ct. 2839, 2851, 81 L.Ed.2d 786 (1984); *New York v. Ferber*, 458 U.S. 747, 770 n. 25, 102 S.Ct. 3348, 3361 n. 25, 73

proper under the second type of facial challenge only if "there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits." *Id.* at 444 & n. 11 (internal quotation marks omitted). Not only have appellees failed to make that showing, the majority correctly holds that the honorarium ban *is* constitutional as to Congress and the judicial branch, *see* Maj. Op. at 1278, and concedes that "for some of § 501(b)'s applications—perhaps many of them—the *Pickering* balance supports its constitutionality." *Id.* at 1274.

Although the fact that the ban has constitutionally permissible applications does not mean that the ban is narrowly tailored, *see Ward v. Rock Against Racism*, 491 U.S. 781, 800, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989), it does necessarily mean that the statute may not be invalidated on its face, assuming the constitutionally permissible applications are "easily identifiable."⁶ *See, e.g., Secretary of State of* L.Ed.2d 1113 (1982); *United States Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 580-81, 93 S.Ct. 2880, 2897-98, 37 L.Ed.2d 796 (1973); *Moore v. City of Kilgore*, 877 F.2d 364, 391 (5th Cir.), *cert. denied*, 493 U.S. 1003, 110 S.Ct. 562, 107 L.Ed.2d 557 (1989).

⁶ The majority confuses the inquiry into the relative number of constitutional applications a challenged statute has, for the analytically distinct purposes of deciding whether a statute is narrowly tailored and, if not, whether it is facially invalid. *See* Maj. Op. at 1276 n. 4 (stating that "[t]he presence of some permissible applications of the [honorarium] statute that are 'easily identifiable' does not immunize a statute from facial invalidation" in cases where, as here, "the scope of the invalid applications is large"). As stated in the text, I agree that if a statute has a comparatively large number of unconstitutional applications, the statute is not narrowly tailored under *Ward*. However, under the majority's analysis, *any* statute that is not narrowly tailored is facially invalid. With this I cannot agree. Contrary to the majority's conclusion, a statute *can* be overbroad (*i.e.*, not narrowly tailored) yet facially constitutional. *See, e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-05, 105 S.Ct. 2794, 2800-02, 86 L.Ed.2d 394 (1985) (obscenity statute held not narrowly tailored yet facially constitutional); *United States v. Grace*, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (same as to statute

Maryland v. Joseph H. Munson Co., 467 U.S. 947, 965, 104 S.Ct. 2839, 2851, 81 L.Ed.2d 786 (1984); *New York v. Ferber*, 458 U.S. 747, 770 n. 25, 102 S.Ct. 3348, 3361 n. 25, 73 L.Ed.2d 1113 (1982); *United States Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 580-81, 93 S.Ct. 2880, 2897-98, 37 L.Ed.2d 796 (1973). Here, the honorarium ban does have an easily identifiable core of constitutional application—at the very least, it may constitutionally be applied to judges and their staff and Members of Congress and their staff. *See* Maj. Op. at 1279. Thus, the ban cannot be invalidated on its face consistently with the above cases.

For the foregoing reasons, sustaining appellees' facial challenge runs counter to the mandate of several Supreme Court cases. *See New York State Club Ass'n v. New York City*,

banning demonstrations on the Supreme Court grounds); *National Ass'n for the Advancement of Colored People v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) (same as to statute banning solicitation by attorneys); *Moore v. City of Kilgore*, 877 F.2d 364, 390-93 (5th Cir. 1989) (same as to restriction on municipal fire-fighters' speech).

As the Supreme Court has held, when a statute is not narrowly tailored but nonetheless does have a "core of easily identifiable and constitutionally proscribable conduct," *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 967 n. 13, 104 S.Ct. 2839, 2852 n. 13, 81 L.Ed.2d 786 (1984) (emphasis added), "the Court has required a litigant to demonstrate that the statute 'as applied' to him is unconstitutional." *Id.* at 976, 104 S.Ct. at 2857 (citing cases); *see also Brockett*, 472 U.S. at 504, 105 S.Ct. at 2802 (overbroad statutes are not to be facially invalidated under the first exception to the rule against facial challenges unless "the identified overbreadth is incurable and would taint all possible applications of the statute"). Indeed, this Circuit has recently held that *Munson* must be given full effect, not an unduly narrow and crabbed reading, such as the majority's. *See Sanjour v. EPA*, 984 F.2d 434, 444 (D.C. Cir. 1993) (under *Munson* a plaintiff challenging a statute's tailoring in all possible applications "must carry the heavy burden of showing that the challenged statute or regulation is not narrowly tailored and that there is no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits") (internal quotation marks omitted).

487 U.S. 1, 11, 108 S.Ct. 2225, 2233, 101 L.Ed.2d 1 (1988); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 964-65, 967 n. 13, 104 S.Ct. 2839, 2850-51, 2852 n. 13, 81 L.Ed.2d 786 (1984); *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772 (1984); *New York v. Ferber*, 458 U.S. 747, 769, 102 S.Ct. 3348, 3361, 73 L.Ed.2d 1113 (1982). It also runs counter to this Circuit's decision in *Sanjour v. EPA*, 984 F.2d 434 (D.C.Cir. 1993). Further, it creates a conflict with the Fifth Circuit. See *Moore v. City of Kilgore*, 877 F.2d 364, 390-92 (5th Cir.), cert. denied, 493 U.S. 1003, 110 S.Ct. 562, 107 L.Ed.2d 557 (1989). "Believing that in this case the overbreadth doctrine is not merely 'strong medicine,' but 'bad medicine,'" *Munson*, 467 U.S. at 975, 104 S.Ct. at 2856 (Rehnquist, J., dissenting) (citation omitted), I cannot join the majority's facial invalidation of the honorarium ban.

II.

I agree with the majority that *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), is the standard by which the constitutionality of the honorarium ban must be judged. Under the *Pickering* test, we must balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568, 88 S.Ct. at 1734.

I differ from the majority as to both sides of the balance. On the one hand, I find the burden the honorarium ban imposes on appellees' First Amendment rights lighter than the majority perceives; the weight of the government's interest in avoiding the appearance of impropriety or corruption, I find much, much greater.

A. *The Employees' Interest*

The majority holds, correctly, that financial disincentives on speech do burden First Amendment rights and the fact that such disincentives do not prohibit expressive activity only affects the weight of the burden. See Maj. Op. at 1273. This Court recently held as much. See *Sanjour v. EPA*, 984 F.2d 434, 441 (D.C.Cir. 1993) (holding that financial disincentives on speech burden First Amendment rights for purposes of the *Pickering* balance). I find the majority's conclusion as to the effect of that holding on the present controversy inconsistent with Circuit precedent.

In *Sanjour* this Court addressed the constitutionality of a financial disincentive on speech that closely resembles the honorarium ban in certain respects. There, the Environmental Protection Agency ("EPA") issued an Ethics Advisory allowing employees to accept expense reimbursement from nonfederal sources if they spoke "officially"—that is, on behalf of the agency—but not "unofficially." The plaintiffs in *Sanjour* claimed that the Ethics Advisory all but eliminated their ability to engage in expressive activity, given that they, as federal employees, generally are of modest means. Indeed, the dissent in *Sanjour* took the argument one step further, arguing that the Advisory "would apply even if the employee loses income because he has taken uncompensated leave to give the speech." *Sanjour*, 984 F.2d 434, 456 n. 6 (Wald, J.).

In spite of those considerations, *Sanjour* rejected the plaintiffs' contention that the Ethics Advisory "imposes a severe burden on the First Amendment rights of EPA employees" and held that the burden was "moderate, though not insignificant." *Sanjour*, at 441. In so ruling, *Sanjour* stressed that the Advisory "allows [employees] to speak whenever and on whatever topics they choose." *Id.* at 440.

Given the decision in *Sanjour*, we cannot consistently hold that the honorarium ban imposes more than a moderate burden

at most on appellees' First Amendment rights.⁷ Like the EPA Ethics Advisory, the honorarium ban does not prohibit speech, as even the majority is constrained to concede. See Maj. Op. at 1273. Moreover, the ban imposes *significantly* less of a burden on appellees' First Amendment rights than did the Ethics Advisory upheld in *Sanjour*. Unlike the Ethics Advisory, the ban allows employees to recover all of the costs they necessarily incur in expressive activity. The ban only prevents employees from *profiting* from their outside activities.

As then-Judge Thomas wrote for the Court in our prior decision in this case:

Many of the [employees] state that they cannot afford to pay the expenses they incur in connection with their First Amendment activities. The ban does not preclude them from recovering these costs, however. The Act and the OGE regulations expressly exclude "actual and necessary travel expenses" from the definition of an honorarium. *An employee need not receive a direct reim-*

⁷ The degree of inconsistency between the majority's decision and *Sanjour* should not be misunderstood: As previously explained, *Sanjour* forecloses the majority from striking down the honorarium ban on its face, see *supra* pp. 1282-85, and as I explain in the text, *Sanjour* practically dictates the conclusion that the honorarium ban only moderately burdens appellees' First Amendment rights. Furthermore, as I explain in a later section of this dissent, *Sanjour* rejected the demand for objective evidence of harm to the government's compelling interest in avoiding the appearance or actuality of impropriety in the federal workforce and held that courts must defer to the government's determination that a proscribed practice will harm that government interest. See *infra* at pp. 1288-89. The law of this Circuit, whether in error or not, is binding absent correction by a higher court. See *Save Our Cumberland Mountains, Inc. v. Hodel*, 826 F.2d 43, 49 (D.C. Cir. 1987) ("[w]hether or not [a prior case's] position on this point is correct . . . this panel is bound by that position as the law of the circuit"), *vacated in part on other grounds*, 857 F.2d 1516 (D.C. Cir. 1988).

bursement to recover his travel costs; he complies with the honorarium ban as long as he does not earn income for his speaking and writing in excess of his actual and necessary travel expenses. The regulations also exclude from the honorarium ban "[a]ctual expenses in the nature of typing, editing and reproduction costs," and "[m]eals or other incidents of attendance, such as a waiver of attendance fees or course materials furnished as part of the event at which an appearance or speech is made." Fairly read, these provisions encompass all of the necessary expenses that the [employees] incur.

National Treasury Employees Union v. United States, 927 F.2d 1253, 1255 (D.C. Cir. 1991) (emphasis added) (citations omitted). Appellees thus are entirely off the mark in their contention that the honorarium ban "severely handicaps the ability of all but the independently wealthy to seriously pursue writing and speaking activities." Appellees' Br. at 22.

There are, of course, two senses in which NTEU's assertion that the honorarium ban severely burdens free speech rights is theoretically correct, but nonetheless unavailing. First, it may be argued that because appellees' conduct enjoys First Amendment protection, any burden on those rights is necessarily severe for *Pickering* purposes. See Maj. Op. at 1273-74 (failing to specify the particular weight of the employee's side of the balance). That assumption places the analytical cart before the horse: "[C]onduct of government employees is 'protected' when, *after* balancing the interests of employee and employer, it is concluded that the employee's interest in speech outweighs the government's interest as an employer in efficient management." *Foster v. Ripley*, 645 F.2d 1142, 1148 (D.C. Cir. 1981). Moreover, such an absolutist approach to the employee's side of the balance would be inconsistent with the Supreme Court's directive that "[t]he problem in any case is to arrive at a balance between" the competing interests.

Pickering v. Board of Educ., 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). Assuming that any burden on free speech rights is severe renders *Pickering* a balancing test in name only.

Second, the honorarium ban might be said to be severe in its effect on appellees' rights to the extent they depend on honoraria to pay their bills. There is evidence in the record suggesting that at least some Executive Branch employees below GS-16 are financially dependent on the income they have received for their expressive activity. See, e.g., Affidavit of John C. Shelton ¶ 8, at 2 (stating that "based on my current financial situation, I will not be able to continue making payments on my mortgage if I have to give up the income from my writing"). However, to the extent that appellees may be financially dependent on honoraria, the weight of the government interest in avoiding the appearance of impropriety or corruption is greatly bolstered. See *infra* p. 1292.

In view of the foregoing, the honorarium ban only has a moderate impact on appellees' First Amendment rights. See generally *Snepp v. United States*, 444 U.S. 507, 100 S.Ct. 763, 62 L.Ed.2d 704 (1980) (per curiam) (holding that the Central Intelligence Agency could, consistent with the First Amendment, impose a constructive trust denying a former employee the proceeds from expressive activity that harmed a substantial government interest). To the extent the majority accords the employees' side of the balance greater weight, I disagree.

B. The Government's Interest

The majority concedes that the government has a "strong" interest in avoiding the appearance of impropriety or corruption in the public service. Maj. Op. at 1274. I would style the identified government interests "compelling." See *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S.

197, 208, 103 S.Ct. 552, 559, 74 L.Ed.2d 364 (1982); *Buckley v. Valeo*, 424 U.S. 1, 26-29, 96 S.Ct. 612, 638-39, 46 L.Ed.2d 659 (1976) (per curiam). The majority holds that interest sufficiently heavy "to outweigh government employees' interest in engaging in speech for compensation where the compensation creates . . . an appearance [of impropriety]." Maj. Op. at 1274 (emphasis omitted). However, the majority concludes that this balancing "will not save section 501(b) . . . if it is either 'overbroad' or manifests a want of 'narrow tailoring.'" *Id.* at 1274. The majority thereafter rejects the result of the *Pickering* balance insofar as the statute applies beyond Members of Congress, officers and employees of Congress, judicial officers and judicial employees. Apparently, the majority does not find the appearance-of-impropriety weight to sit on the government side of the balance in any other cases. I do not find the majority's justifications for rejecting the applicability of its initial *Pickering* balancing to Executive Branch officers and employees to be convincing.

First, perceiving a lack of legislative or record evidence supporting the legislative premise that accepting honoraria may give rise to an appearance of impropriety or corruption, the majority dismisses as "hypothetical" the risk of either appearance in this case. Maj. Op. at 1276-77. Second, the majority argues that honoraria cannot give rise to an appearance of impropriety or corruption, unless (1) the payor has a conflict of interest with the employee's employing agency or (2) the subject matter of the employee's expressive activity bears a nexus with the employee's government job. I address each of these arguments below.

1. The Majority's Evidence Requirement

The majority argues that the honorarium ban must be deemed not to advance the asserted government interest because "[t]he government points neither to improprieties in the pre-§ 501(b)

era that would have been prevented by § 501(b) but not by the prior regulations, nor to any serious enforcement or line-drawing costs associated with those regulations." Maj. Op. at 1276. For two reasons, the majority's reasoning does not justify its results.

In the first place, I do not agree that the government was required to point to specific evidence of the ill effects of honoraria in the Executive Branch. It is true, as the majority points out, that in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), the Court refused to consider the defendant's argument that corporate advocacy of political causes would undermine the democratic process, on the ground that the defendant's claim was not "supported by record or legislative findings." *Id.* at 789, 98 S.Ct. at 1422. However, the Supreme Court has restricted *Bellotti*'s demand for such findings to cases where the rights being asserted are "[r]ights of political expression and association." *In re Primus*, 436 U.S. 412, 434 n. 27, 98 S.Ct. 1893, 1906 n. 27, 56 L.Ed.2d 417 (1978).⁸

Here, while appellees' expressive activities may pertain to matters of public concern, *see* Maj. Op. at 1273, they do not involve *political* expression. Appellees have written or spoken about art, Russian history, movies, plays and other interesting topics not remotely involving politics.⁹ *See id.* at 1275. There-

⁸ Limiting the requirement for explicit legislative or record evidence to political expression or association, as *In re Primus* did, is not unreasonable because political speech in particular "occupies the highest rung on the hierarchy of First Amendment values." *Connick v. Myers*, 461 U.S. 138, 145, 103 S.Ct. 1684, 1689, 75 L.Ed.2d 708 (1983) (internal quotation marks omitted). Even in that context, though, one might question a requirement for findings because, in any event, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843, 98 S.Ct. 1535, 1543, 56 L.Ed.2d 1 (1978).

⁹ This fact distinguishes this case from *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 105 S.Ct.

fore, the mere fact that the government adduced no record or legislative evidence of Executive Branch improprieties does not justify according no weight to the governmental interests underlying the honorarium ban.¹⁰

Long before *Bellotti*, the Supreme Court made clear that "[f]or regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service." *United Public Workers v. Mitchell*, 330 U.S. 75, 101,

1459, 84 L.Ed.2d 455 (1985) ("*NCPAC*"). The statute struck down in *NCPAC* imposed a \$1,000 limit on campaign expenditures by "political committees" for presidential and vice-presidential candidates receiving federal campaign funding. Given that campaign expenditures implicate political speech and association, *id.* at 493-94, 105 S.Ct. at 1466-67, it was altogether proper, under *Bellotti* and *In re Primus*, to require greater proof of harm to the relevant governmental interest and to reject a vague assertion of harm that was only "hypothetically possible." *Id.*, 470 U.S. at 498, 105 S.Ct. at 1469. Again, here we do not face political speech or association, and the possibility of harm is quite specific and quite real. *See infra* at 1289-90.

¹⁰ Indeed, requiring such proof of the government is inappropriate, given that the honorarium ban is a *prophylactic* rule. Inherent in the very nature of such a rule is the concept that the evil to be avoided has not yet occurred. It follows that it is inappropriate to require evidence of Executive Branch wrongdoing *before* Congress may enact a prophylactic rule against honoraria, and such a requirement is not a result commanded by the Constitution. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam) (upholding prophylactic limitations on campaign contributions); *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973) (upholding Hatch Act's prophylactic ban on political activities and speech of government employees), *reaff'g United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). "Neither we nor the Supreme Court have held that in a *Pickering* case, the Government must prove that a regulation on speech overlaps with the threatened harm to the governmental interest at stake with mathematical precision." *Sanjour v. EPA*, 984 F.2d 434, 447 (D.C.Cir. 1993).

67 S.Ct. 556, 570, 91 L.Ed. 754 (1947). Later, with the full development of *Pickering* cases into a discrete area of First Amendment law, the Supreme Court reinforced *United Public Worker*'s holding. In 1983, the Court ruled that a governmental employer is not required to "tolerate action which he reasonably believe[s] would" cause the harm against which the prophylactic measure is directed. *Connick v. Myers*, 461 U.S. 138, 154, 103 S.Ct. 1684, 1693, 75 L.Ed.2d 708 (1983); see also *Sanjour v. EPA*, 984 F.2d 434, 440 (D.C.Cir. 1993) (holding that "employer is not required to tolerate action which it reasonably believed would cause harm") (internal quotation marks and brackets omitted); *Hubbard v. EPA*, 949 F.2d 453, 460 (D.C.Cir. 1991) (same), *vacated in part on other grounds*, 982 F.2d 531 (D.C.Cir. 1992) (en banc). Indeed, we have construed a post-*Connick* Supreme Court case, *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987), to allow us to "draw[] reasonable inference of harm" from proscribed employee activities and therefore, on that ground, rejected an argument that "objective evidence of concrete harm" is required. *Hall v. Ford*, 856 F.2d 255, 260-61 (D.C.Cir. 1988).

I would hold these standards, rather than *Bellotti*, to be controlling here, and conclude that Congress's determination that only a complete ban on honoraria can effectively avoid the ill effects of honoraria is reasonable. After all, as the record reveals, following a two-year study of Executive Branch agencies' enforcement of prior ethics laws relating to honoraria, the Government Accounting Office ("GAO") concluded that federal ethics enforcement has been consistently impeded by agencies' "overly permissive policies and practices." Report to the Chairman, Senate Subcomm. on Fed. Servs., Post Office and Civil Serv., Comm. on Governmental Affairs, *Employee Conduct Standards: Some Outside Activities Present Conflict-of-Interest Issues*, at 9 (Feb. 1992) ("GAO Report").

Further, the OGE's efforts to ensure that ethics laws were more evenly enforced had been far from successful. See *id.* at 2 (reporting that "agencies did not always implement OGE's recommendations"); see also *id.* at 12-13 (same). Because of these failures to enforce ethics regulations, "agencies [had] approved activities that were questionable as to the appropriateness of accepting compensation" from sources outside the federal government. *Id.* at 9. The GAO Report thus supports the reasonableness of Congress's belief that only a comprehensive, categorical ban on honoraria can effectively prevent the problems of evisceration and underenforcement inherent in the prior system of patchwork ethics laws. See *infra* at 1291 (summarizing prior ethics laws).

Moreover, in enacting the ban, Congress had before it evidence that allowing employees in the Executive Branch to accept honoraria can give rise to an appearance of impropriety or corruption. Two separate blue-ribbon commissions, the Quadrennial Salary Commission and the Wilkey Commission, conducted hearings examining the actual or potential impact of allowing federal employees, including Members of Congress, to accept honoraria. Though separate, both commissions reached the same conclusion—accepting honoraria creates an appearance of impropriety that jeopardizes the public's faith in their government and its employees. See *To Serve With Honor: Report of the President's Commission on Federal Ethics Law Reform*, at 35, 36 (Mar. 1989) (hereinafter "*Wilkey Commission Report*") (stating that "[h]onoraria paid to officials can be a camouflage for efforts by individuals or entities to gain the officials' favor" and that "the current ailment [caused by accepting honoraria] is a serious one"); *Fairness for Our Public Servants: Report of the 1989 Commission on Executive, Legislative and Judicial Salaries*, at 24 (Dec. 1988) (hereinafter "*Quadrennial Commission Report*") (con-

cluding that "[t]he potential for abuse or the appearance of abuse is obvious to the public" and that public confidence in the government "is threatened by the steady growth of this practice [honoraria]," particularly in Congress).

Although both commissions relied principally on the congressional experience, which revealed a venerated institution of government appearing corrupt in the eyes of the public by virtue of honoraria, they recognized that what has happened in Congress can happen in the judicial and executive branches. As the Wilkey Commission explained,

Although we are aware of no special problems associated with the receipt of honoraria within the judiciary, the Commission—in the interest of alleviating abuses within the legislative branch and in applying equitable limitations across the government—joins the Quadrennial Commission in recommending the enactment of legislation to ban the receipt of honoraria by all officials and employees in all three branches of government.

Wilkey Commission Report, at 35-36. Accordingly, both commissions recommend that honoraria should be completely abolished in all three branches of the federal government. *See id.*; *Quadrennial Commission Report*, at 24 ("strongly recommend[ing]" that "the practice of honoraria in all three branches be terminated by statute" and that "[t]he prohibition [on honoraria] should be extended to all Congressional and judicial staff").

Given these reports of the Quadrennial and Wilkey Commissions, Congress could reasonably believe that employee acceptance of honoraria can create—and in fact has created—an appearance of impropriety or corruption in the eyes of the public. In my view, given the reasonableness of that legislative premise, we are required to assign the government interest compelling weight in the *Pickering* balance. *See Connick v.*

Myers, 461 U.S. 138, 154, 103 S.Ct. 1684, 1693, 75 L.Ed.2d 708 (1983); *United Public Workers v. Mitchell*, 330 U.S. 75, 101, 67 S.Ct. 556, 570, 91 L.Ed. 754 (1947); *Sanjour v. EPA*, 984 F.2d 434, 440 (D.C.Cir. 1993) (same); *Hubbard v. EPA*, 949 F.2d 453, 460 (D.C.Cir. 1991), *vacated in part on other grounds*, 982 F.2d 531 (D.C.Cir. 1992) (en banc).

Wholly apart from the majority's erroneous refusal to give effect to Congress's reasonable belief that a complete ban on honoraria was necessary, the majority's demand for evidence of honoraria-induced harm in the Executive Branch which was not adequately addressed by prior law presses judicial review beyond its proper law presses judicial review beyond its proper bounds. As the Supreme Court has commanded, courts should not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil to be feared." *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 210, 103 S.Ct. 552, 561, 74 L.Ed.2d 364 (1982); *see also Buckley v. Valeo*, 424 U.S. 1, 27, 96 S.Ct. 612, 638, 46 L.Ed.2d 659 (1976) (per curiam) (upholding campaign contribution limitations designed to address the real or perceived problem with *quid pro quo* arrangements even though bribery laws and disclosure requirements already dealt with that concern). That is especially so, given that the honorarium ban is but the latest step in Congress's careful adjustment of federal ethics laws. *See National Right to Work Comm.*, 459 U.S. at 209, 103 S.Ct. at 560 (stating that courts owe "considerable deference" to Congress's "careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step") (internal quotation marks omitted).

In rejecting Congress's assessment that prior ethics laws were inadequate to avoid honoraria-induced appearances of impropriety, the majority relies on *Boos v. Barry*, 485 U.S. 312, 324-29, 108 S.Ct. 1157, 1165-68, 99 L.Ed.2d 333 (1988), for the proposition that "the 'most useful starting point' for

assessing whether a statute is narrowly tailored is to 'compare it with an analogous statute.' " Maj. Op. at 1276. True, in that decision, the Supreme Court did compare the statute challenged as not narrowly tailored for the asserted governmental interest to an analogous statute (and its legislative history). The challenged statute, enacted in 1938, was sweeping in its reach and, the Court concluded, extended to expressive activities. 485 U.S. at 329, 108 S.Ct. at 1168. In contrast, the statute deemed analogous, which was enacted in 1972, was considerably narrower, in that it contained a provision stating that "[n]othing contained in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the first amendment." *Id.* at 325, 108 S.Ct. at 1166 (quoting Pub.L. No. 92-539, § 301(e), 86 Stat. 1073 (1972)). The analogous statute was further narrowed in 1976, when Congress deleted a provision that it felt " 'raise[d] serious Constitutional questions because it appear[ed] to include within its purview conduct and speech protected by the First Amendment.' " *Id.* at 326, 108 S.Ct. at 1166 (quoting S.Rep. No. 1273, 94th Cong., 2d Sess. 8 n. 9 (1976)).

The comparison between the challenged law and the analogous statute, according to the Court, revealed that "Congress has determined that [the challenged statute] adequately satisfies the Government's interest." *Id.* Deferring to that determination by Congress, the Court "conclude[d] that the availability of alternatives such as [the analogous statute] amply demonstrates that the [challenged law] is not crafted with sufficient precision to withstand First Amendment scrutiny." *Id.* at 329, 108 S.Ct. at 1168. *Boos*, then, is simply the flip side of cases such as *National Right to Work Comm.* and supports, rather than undermines, the judicial duty to give considerable deference to Congress's evaluation of the effectiveness of its prior laws. Here, because Congress has concluded that prior law was too narrow to effectuate the relevant government

interests, *National Right to Work Comm.*, the Hatch Act cases and their progeny are the applicable precedents, not *Boos*.

In the case before us, a comparison of the honorarium ban to prior ethics laws unmistakably reveals a congressional determination that only a broad, government-wide ban on honoraria is sufficient to protect against the appearances of impropriety or corruption accepting honoraria creates. Congress at first determined to allow people in all three branches of the federal government to accept honoraria, subject to amount limitations. See Pub.L. No. 93-443, § 101(f)(1); 88 Stat. 1268 (1974) (establishing \$1,000 cap on honoraria for each covered activity and \$15,000 annual cap, both exclusive of actual travel and subsistence expense reimbursement); Pub.L. No. 94-283, § 112(2), 90 Stat. 475, 494 (1976) (raising the individual and annual limits to \$2,000 and \$25,000, respectively). When Congress determined that these limitations were insufficient to curb actual or perceived abuses in Congress, each House adopted rules drastically restricting Members' ability to accept honoraria, although only the House of Representatives' rule actually went into effect. See *Financial Ethics: Communication from the Chairman, House Committee on Administrative Review*, H.R. Doc. No. 73, 95th Cong., 1st Sess. 9-12 (1977) (setting \$750 limit for individual covered activities, as well as rules limiting acceptable outside income and expense reimbursement); *Senate Code of Official Conduct: Report of the Senate Special Committee on Official Conduct*, S.Rep. No. 49, 95th Cong., 1st Sess. 8-9, 37-40 (1977) (adopting similar restrictions as to Senate).

Some classes of congressional and judicial staff completely fell through the cracks of this patchwork of ethics regulations and were able to accept honoraria without limitation. See *Quadrennial Commission Report*, at 24. Even employees who were covered often were able to circumvent the limitations by, for example, receiving approval by their employing agencies

of prohibiting transactions. See *GAO Report* (concluding after survey of Executive Branch enforcement of ethics regulations that improper transactions frequently occur by virtue of law enforcement).

Ultimately, Congress decided to dispense with its step-by-step approach to regulating honoraria, in favor of a uniform, government-wide ban. See 5 U.S.C. app. § 501 *et seq.* (1988 Supp. I). Congress made that decision based on two reports recommending that such action was critical to restoring or maintaining public confidence in the propriety of government employees' performance of their public functions. Congress's careful and deliberate approach to addressing the appearance of impropriety caused by employees accepting honoraria, as well as Congress's assessment of the ineffectiveness of prior ethics laws, are entitled to "considerable deference" from this Court. *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 209, 103 S.Ct. 552, 560, 74 L.Ed.2d 364 (1982). I, therefore, cannot accept the majority's conclusion that there were no "improprieties in the pre-§ 501(b) era that would have been prevented by § 501(b) but not by the prior regulations." Maj. Op. at 1276.

2. The Majority's Nexus Requirement

I also cannot accept the majority's proposition that "[t]o create the sort of impropriety or appearance of impropriety at which the statute is evidently aimed, there would have to be some sort of nexus between the employee's job and either the subject matter of the expression or the character of the payor." Maj. Op. at 1275. As *amicus* Common Cause puts it, "a defense contractor can just as easily and just as effectively gain improper influence by paying an honorarium to a Defense Department official to speak about hydrangeas as about hydraulics." *Amicus Br.* at 25. We recognized this in *Sanjour*,

984 F.2d 434, 450 (D.C.Cir. 1993), stating that apart from any payor-payee or subject-matter nexus, "accepting valuable benefits from non-federal sources . . . is the root cause of such an appearance," that is, an appearance of impropriety. All the public sees are employees, entrusted with carrying out the business of the government, receiving substantial payments from entities outside of the government—the public may not pause to consider whether there is a relationship between the payor and payee or the activity for which the honorarium is paid and the payee's job.

Appellees argue that Congress's determination that a complete ban on honoraria was necessary to avoid the feared appearances is of little moment here because the reports on which it relied employed a different definition of honoraria than the honorarium ban does. It is true that both reports define honoraria to "include 'payments for public appearances to deliver a talk or engage in a colloquy at the invitation of some non-government group.'" *Wilkey Commission Report*, at 35 (quoting *Quadrennial Commission Report*, at 24), whereas Congress defined "honorarium," in pertinent part, as "a payment of money or any thing of value for an appearance, speech or article . . . by a Member [of Congress], officer or employee, excluding any actual and necessary travel expenses incurred by such individual." 5 U.S.C. app. § 505(3). That, however, is a distinction without a difference, for present purposes.

The issue here is whether a nexus is necessary for accepting honoraria to give rise to an appearance of impropriety or corruption, and on that issue, the definitions the statute and the reports utilize are in unison. Neither report defined honorarium to require the sort of nexus the majority describes. Indeed, the Wilkey Commission explained that "[t]o curtail the risk that individuals will find a way to circumvent these restrictions, the ban on honoraria necessarily needs to extend

both to activities related to an individual's official duties and to other activities." *Wilkey Commission Report*, at 36 (emphasis added). In addition, the Quadrennial Commission reported to Congress that "honoraria should be defined so as to close present and potential loopholes such as receipt of consulting, professional or similar fees; payments for serving on boards; travel, sport, or other entertainment expenses not reasonably necessary for the appearance involved; or any other benefit that is the substantial equivalent of an honorarium." *Quadrennial Commission Report*, at 24 (emphasis added). Therefore, Congress's determination that appearances of impropriety can result from accepting honoraria for speeches or writings lacking a subject-matter or payor-payee nexus is reasonable.

3. *Narrow-Tailoring and the Pickering Balance*

Based on the discussion above, I would hold that the honorarium ban is sufficiently narrowly tailored to survive facial challenge.¹¹ The Supreme Court has stated that "[a] complete ban can be narrowly tailored but only if each activity within the proscription's scope is an appropriately targeted evil." *Ward*, 491 U.S. at 800, 109 S.Ct. at 2758 (quoting *Frisby v. Schultz*, 487 U.S. 474, 485, 108 S.Ct. 2495, 2502, 101 L.Ed.2d 420 (1988)). So it is here.

¹¹ I agree with the majority, however, that the more lenient tailoring requirement described in *Ward v. Rock Against Racism*, 491 U.S. 781, 800, 109 S.Ct. 2746, 2758, 105 L.Ed.2d 661 (1989), applies to content-neutral restrictions on speech, such as the honorarium ban. See Maj. Op. at 1274. I believe the Court should explicitly acknowledge that the *Ward* definition supersedes this Circuit's more stringent prior definition, which demanded that even content-neutral restrictions "be narrowly drawn to restrict speech no more than is necessary to protect a substantial governmental interest." *McGehee v. Casey*, 718 F.2d 1137, 1143 (D.C.Cir. 1983) (brackets and internal quotation marks omitted).

Here, it was appropriate to "target" employee acceptance of honoraria without a direct job nexus. First, as we have held, "accepting valuable benefits from non-federal sources . . . is the root cause" of an appearance of impropriety or corruption. *Sanjour v. EPA*, 984 F.2d 434, 450 (D.C.Cir. 1993). Second, based on the history of federal enforcement of honoraria regulations since Watergate, Congress could conclude that anything short of a complete ban on honoraria will allow employees to circumvent, advertently or otherwise, rules relating to honoraria. See *GAO Report*, at 9; *Wilkey Commission Report*, at 36; *Quadrennial Commission Report*, at 24. Although it might have been wise to allow the acceptance of honoraria in the absence of a nexus of the type the majority imposes, I cannot help but conclude that the honorarium ban is sufficiently tailored in the constitutional sense.

In fact, the conclusion that the honorarium ban is narrowly tailored follows from *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (per curiam), and the Supreme Court cases upholding the Hatch Act, 5 U.S.C. § 7324 *et seq.* (1988), *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed.754 (1947).¹² In *Buckley* the Supreme Court upheld statutory limits on campaign contributions to candidates for federal elective office yet struck down independent campaign expenditure limitations. Both limitations were justified in part as prophylactic measures reasonably necessary

¹² The Supreme Court has read these cases to stand for the broad proposition that government employees may "act[] to protect substantial governmental interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment." *Snepp v. United States*, 444 U.S. at 509 n. 3, 100 S.Ct. at 765 n. 3 (upholding restriction denying employees the right to profit from expressive activity that harms a substantial government interest).

to avoiding corruption or an appearance of corruption.

In upholding the contribution limitations, the Supreme Court emphasized that the feared appearance arose from the fact that the candidates who receive "large contributions" receive valuable benefits, "increasing[ly] importan[t] . . . to effective campaigning," which may be given "to secure a political *quid pro quo*." 424 U.S. at 26, 95 S.Ct. at 638. Such an appearance did not arise from independent campaign expenditures—that is, expenditures by entities independent from a political campaign that were not coordinated with any campaign—because the candidate received no perceptible benefit from the expenditure. *Id.* at 47, 96 S.Ct. at 648 (stating that "[u]nlike [campaign] contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive"). It mattered not to the Court, in upholding the statutory campaign contribution limits, that preexisting statutes prohibited such corrupt exchanges and required disclosure of large campaign contributions: "Congress was surely entitled to conclude that . . . contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." *Id.* at 28, 96 S.Ct. at 639.

There can be little question that the honorarium ban is more analogous to the contribution limitations upheld in *Buckley* than to the expenditure limitations invalidated therein. Honoraria, by definition, is a valuable benefit to the federal employee; it goes beyond expense reimbursement and constitutes income—a net financial gain. See *National Treasury Employees Union v. United States*, 927 F.2d 1253, 1255 (D.C.Cir. 1991). Even a modest honorarium can often approach or exceed an employee's weekly salary, see, e.g., Affidavit of David E. Hubler ¶ 4, at 2 (stating that he earned "\$500 to \$1,500 per article" as honoraria); Affidavit of Richard Deutsch

¶ 10, at 3 (stating that he had been offered \$3,000 to write a magazine article), and is sufficiently great to create financial dependency on the honoraria. See, e.g., Affidavit of John C. Shelton ¶ 8, at 2 (stating that "based on my current financial situation, I will not be able to continue making payments on my mortgage if I have to give up the income from my writing"). Just as the receipt of a valuable benefit by one who may be financially dependent thereon was held to create an appearance of corruption in *Buckley*, see 424 U.S. at 26, 96 S.Ct. at 638, so the acceptance of honoraria—cash in excess of necessary costs—by federal employees creates an appearance of impropriety or corruption.

In the Hatch Act cases, on which the Court in *Buckley* relied in sustaining the campaign contribution limits, the Court upheld the Hatch Act's sweeping restrictions on the off-duty political activities of federal employees. See *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). The Hatch Act forbids federal employees from "tak[ing] an active part in political management or in political campaigns," but allows employees to vote and to express their political opinions. 5 U.S.C. § 7324(a)(2) (1988). In *United Public Workers*, the Court held that the proscribed political activity was "reasonably deemed by Congress to interfere with the efficiency of the public service," which, the Court stressed, was all that was necessary to sustain its constitutionality. 330 U.S. at 101, 67 S.Ct. at 570.

The Court "unhesitatingly reaffirm[ed]" that conclusion almost three decades later, in *Letter Carriers*, 413 U.S. at 556, 93 S.Ct. at 2886. There the Court ruled that "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the

system of representative Government is not to be eroded to a disastrous extent." *Id.* at 565, 93 S.Ct. at 2890. The Court held that Congress's determination that even off-duty political activity by federal employees threatened public confidence in the impartiality of public employees was reasonable, in that it rested on "the judgment of history, a judgment made by this country over the last century that it is in the best interest of the country, indeed essential, that . . . the political influence of federal employees on others and on the electoral process should be limited." *Id.* at 557, 93 S.Ct. at 2886. Neither the absence of legislative or record evidence substantiating the congressional determination nor the presence of preexisting laws addressing the evils that flow from a politicized federal workforce prevented the Court from counting the asserted government interest in the *Pickering* balance.¹³ *Id.* 413 U.S. at 564-67, 93 S.Ct. at 2889-91.

Here, just as in the Hatch Act cases, Congress relied on the judgment of history in enacting the honorarium ban. That history reveals several facts that support the reasonableness of Congress's determination that honoraria must be banned from the federal government. First, honoraria undermine public confidence in government by creating an appearance of impropriety or corruption. *Wilkey Commission Report*, at 35, 36

¹³ The majority's attempted distinction of the Hatch Act cases—that there, because "[t]he potential for such subtle [political] pressure is not only pervasive but inherently difficult to demonstrate or assess . . . the absence of episodes coming to light is quite consistent with the congressional concern" and no evidence was necessary, *Maj. Op.* at 1277—is unavailing. The congressional motivation for the Hatch Act was to achieve a federal workforce actually and perceived to be free of political influence. See *Letter Carriers*, 413 U.S. at 565, 93 S.Ct. at 2890 (referring to avoiding these congressional concerns as a "major thesis of the Hatch Act"). The predominant motivation for the Hatch Act mirrors Congress's present desire to avoid the actuality or appearance of impropriety that employees' accepting honoraria can cause.

(stating that "[h]onoraria paid to officials can be a camouflage for efforts by individuals or entities to gain the officials' favor" and that "the current ailment [caused by accepting honoraria] is a serious one"); *Quadrennial Commission Report*, at 24 (concluding that "[t]he potential for abuse or the appearance of abuse is obvious to the public" and that public confidence in the government "is threatened by the steady growth of this practice [honoraria]," particularly in Congress).

Second, only a uniform, government-wide ban will prevent determined federal employees from attempting to supplement their salaries by exploiting loopholes in ethics laws. See *GAO Report*, at 9 (concluding from the survey of Executive Branch enforcement of prior ethics laws that federal ethics enforcement has been impeded by agencies' "overly permissive policies and practices"); see also *Wilkey Commission Report*, at 36 (explaining that "[t]o curtail the risk that individuals will find a way to circumvent these restrictions, the ban on honoraria necessarily needs to extend both to activities related to an individual's official duties and to other activities"); *Quadrennial Commission Report*, at 24 (concluding that "honoraria should be defined so as to close present and potential loopholes such as receipt of consulting, professional or similar fees; payments for serving on boards; travel, sport, or other entertainment expenses not reasonably necessary for the appearance involved; or any other benefit that is the substantial equivalent of an honorarium"). The conclusion that the honorarium ban is narrowly tailored under *Ward*, in sum, is all but dictated by the Supreme Court's decisions in *United Public Workers* and *Letter Carriers*, not to mention *Buckley*.

In view of my conclusion that the ban is narrowly tailored under *Ward*, it follows that the *Pickering* balance favors the honorarium ban. The ban imposes at most only a moderate burden on First Amendment rights because it allows appellees

to engage in covered activities whenever and on whatever topics they choose and to accept reimbursement for all expenses they necessarily incur in doing so. At the same time, the ban fully effectuates the compelling government in avoiding the appearance of impropriety that allowing employees to accept honoraria causes, an interest Congress reasonably believed is harmed by tolerating honoraria. As a consequence, I would hold the honorarium ban constitutional under *Pickering*.

III.

I also find unacceptable the majority's mode of severance. The majority limits its holding by "striking" 'officer or employee' from § 501(b) *except* in so far as those terms encompass [M]embers of Congress, officers and employees of Congress, judicial officers and judicial employees," Maj. Op. at 1279, treating its redefinition of "officer or employee" as "a proper form of severance." *Id.* I do not believe this is consistent with controlling precedent on the subject of severance.

It is, of course, true that "if [a] federal statute is not subject to a narrowing construction and is impermissibly overbroad, only the unconstitutional portion is to be invalidated." *New York v. Ferber*, 458 U.S. 747, 769 n. 24, 102 S.Ct. 3348, 3361 n. 24, 73 L.Ed.2d 1113 (1982); *see also Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S.Ct. 3262, 3268, 82 L.Ed.2d 487 (1984) (plurality opinion). However, it is settled that the duty to sever does not empower courts to "introduce words of limitation in order to uphold the valid applications" of a challenged statute. NORMAN J. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 44.16, at 529 (4th ed. 1986) (citing cases). "[T]he general federal rule is that courts do not rewrite statutes to create constitutionality." *Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir. 1991); *see generally id.* at 1124-25 (canvassing relevant caselaw of the Supreme Court).

Though severability may be achieved "by striking out or disregarding words that are in the [challenged] section," it may *not* be achieved "by inserting [words] that are not now there." *United States v. Reese*, 92 U.S. (2 Otto) 214, 221, 23 L.Ed. 563 (1875). Inserting into a statute words that Congress did not enact "would be to make a new law, not to enforce an old one," which "is no part of our [judicial] duty." *Id.*; *see also Trade-Mark Cases*, 100 U.S. (10 Otto) 82, 98, 25 L.Ed. 550 (1879) (holding that "it is not within the judicial province to give the words used by Congress a narrower meaning than they were manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body"). Although the Supreme Court cases discussed above involved penal Acts of Congress, their mandate, which is of continuing vitality, "has not been limited to penal statutes." *Eubanks*, 937 F.2d at 1125. Thus, for example, the Supreme Court, in *American Tobacco Co. v. Patterson*, 456 U.S. 63, 75, 102 S.Ct. 1534, 1540, 71 L.Ed.2d 748 (1982), noted that its decisions have "refused to narrow § 703(h)[, 42 U.S.C. § 2000e-2(h) (1988)] by reading into it limitations not contained in the statutory language."

As one state court summarized the Supreme Court's severance precedents:

[W]henver a court, in order to uphold the provisions of a statute as constitutional, has to *interpolate* in such statute provisions not put there by the Legislature, in order, by *such* interpolation, to make the provision which the Legislature did put their constitutional, *this* is no case of severance, in any proper legal sense; nor is it in any legal or logical sense, a proper *limitation* of the provisions which are in a statute by judicial construction. *Such an action by a court is nothing less than judicial legislation pure and simple.*

Ballard v. Mississippi Cotton Oil Co., 81 Miss. 507, 574, 34 So. 533, 554 (1902) (citing United States Supreme Court cases). In the Supreme Court's words, "it is for Congress, not this Court, to rewrite . . . [federal] statute[s]." *Blount v. Rizzi*, 400 U.S. 410, 419, 91 S.Ct. 423, 429, 27 L.Ed.2d 498 (1971).

Viewed in light of these principles, the majority's severance in this case is "nothing less than judicial legislation." *Ballard*, 81 Miss. at 574, 34 So. at 554. Expressly disclaiming any intent to strike "officer or employee" from the honorarium ban because "that would invalidate the ban beyond the executive branch," the majority writes into the statutory definition of that phrase a limitation to "[M]embers of Congress, officers and employees of Congress, judicial officers and judicial employees." Maj. Op. at 1279. This is precisely what the Supreme Court has said federal courts may not do. See generally *Eubanks v. Wilkinson*, 937 F.2d 1118, 1124-25 (6th Cir. 1991) (discussing Supreme Court cases holding that federal courts may not rewrite federal statutes, under the guise of severance or otherwise).

The majority reads *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985), as support for the proposition that federal courts may, under the rubric of "severance," insert words of limitation into a statute. *Brockett*, the majority explains, "'pretermitt[ed]' the issue of whether [the statutory term] 'lust' might be construed as referring only to morbid and shameful interests . . . and instead severed from the statute any meaning of lust other than shameful and morbid interests." Maj. Op. at 1279 (quoting *Brockett*, 472 U.S. at 500, 105 S.Ct. at 2800). Actually, the issue the Court pretermitted was whether or not it was required to defer to the lower court's conclusion that a saving construction of the term "lust" was impossible. 472 U.S. at 500, 105 S.Ct. at 2800. In any event, *Brockett*, properly understood, has no application here on the issue of severance (it is nonetheless instructive

insofar as it declined to invalidate facially a statute held to be not narrowly tailored, on the ground the statute nonetheless had an easily identifiable core of constitutionally permissible application). See *supra* p. 1284 n. 6.

First, in *Brockett* it was far from clear that the legislature intended for "lust," the challenged statutory term, to have the reach the plaintiffs ascribed to it. See 472 U.S. at 500 n. 10, 105 S.Ct. at 2800 n. 10 (stating that "[a]ppellants make a strong argument that the Court of Appeals erred in construing the Washington statute"). Here, of course, the contrary is true—Congress unmistakably intended to prohibit appellees, and their counterparts in the other branches of the federal government, from accepting honoraria. See 5 U.S.C. app. § 505(2) (applying the honorarium ban to "any officer or employee of the Government" except as exempted by statute). Even appellees concede that point. See Appellees' Br. at 34 (disclaiming any suggestion that "[Executive Branch employees'] coverage was 'inadvertent'").

Second, *Brockett's* holding was the product of the unusual and unique circumstances therein presented. Prevented from imposing a saving construction by the difficult issue of whether it was required to defer to the lower court's interpretation of the statute, the Court accomplished the same result via severance. Outside the unique circumstances of *Brockett*, no Supreme Court decision has employed the type of "severance" the majority employs here. Indeed, the Court on several occasions since *Brockett* has expressly refused to introduce words of limitation into statutes under the guise of "severance." See, e.g., *Wyoming v. Oklahoma*, ___ U.S. ___, ___, 112 S.Ct. 789, 803, 117 L.Ed.2d 1 (1992) (refusing to perform "severance," excluding the unconstitutional applications from Oklahoma statute requiring all utilities seeking to provide electricity in Oklahoma to purchase at least 10% of its coal from Oklahoma sources, because "it is clearly not this Court's

province to rewrite a state statute"), cf. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 764-65, 106 S.Ct. 2169, 2180-81, 90 L.Ed.2d 779 (1986) (refusing to sever from a statute restricting abortion a requirement that women seeking abortions be informed of the medical and psychological risks associated with abortion because "[t]he radical dissection necessary for [severance] would leave [the statute] with little resemblance to that intended by the Pennsylvania Legislature"), *overruled in part on other grounds*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

The majority's "severance" appears to me inconsistent with these post-*Brockett* cases. Even though the statute construed in *Wyoming*, as in *Brockett*, unlike the honorarium ban, contained a severability clause, the Court refused to introduce words of limitation in the statute to save its constitutionality, explaining

[The statute] applies to "[a]ll entities providing electric power for sale to the consumer in Oklahoma" and commands them to purchase 10% Oklahoma-mined coal. Nothing remains to be saved once that provision is stricken. Accordingly, the Act must stand or fall on its own. We decline Oklahoma's suggestion that the term "all entities" be read to uphold the Act only as to the [Grand River Dam Authority, an agency of the state of Oklahoma], for it is clearly not this Court's province to rewrite a state statute. If "all entities" is to mean "the GRDA" or "state-owned utilities," the Oklahoma Legislature must be the one to decide.

___ U.S. at ___, 112 S.Ct. at 803-04 (emphasis added) (quoting Oklahoma statute). Although *Wyoming* dealt with a state statute, it cannot seriously be doubted that federal courts do not have license to rewrite federal statutes. See *Blount v. Rizzi*,

400 U.S. 410, 419, 91 S.Ct. 423, 429, 27 L.Ed.2d 498 (1971); *Eubanks v. Wilkinson*, 937 F.2d 1118, 1122 (6th Cir. 1991).

As applied to this case, *Wyoming* teaches that a *Brockett*-type "severance" is entirely inappropriate. Like the protectionist statute invalidated in *Wyoming*, the honorarium ban is sweeping in its application, reaching "any officer or employee of the Government" (with a narrow statutory exception). 5 U.S.C. app. § 505(2). Also, here, as in *Wyoming*, the legislature unmistakably intended the breadth of their respective statutes; in this respect, each case differs from *Brockett*.

Finally, in this case, no less than in *Wyoming*, severance would leave in place "a fundamentally different piece of legislation" than originally enacted, *Wyoming*, ___ U.S. at ___, 112 S.Ct. at 804, for Congress enacted a uniform, government-wide ban on honoraria. See *Wilkey Commission Report*, at 35-37 (referring, e.g., to "the extreme lack of uniformity across the three branches of government in the rules governing honoraria" and a need for "applying equitable limitations [on honoraria] across the government"). Leaving the ban operative as to officers or employees in the legislative and judicial branches, but not the Executive Branch, contravenes that congressional intent, and it is the intent of Congress that is controlling on the issue of severability. See *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684-85, 107 S.Ct. 1476, 1479-80, 94 L.Ed.2d 661 (1987); *Regan v. Time, Inc.*, 468 U.S. 641, 653, 104 S.Ct. 3262, 3269, 82 L.Ed.2d 487 (1984) (plurality opinion).

In short, since the majority has facially invalidated the honorarium ban, it should strike "officer or employee" in its entirety from the statute, leaving the honorarium ban in place only as to Members of Congress. Its failure to do so may reflect a reluctance to facially invalidate the honorarium ban. That reluctance, however, would be better served by striking the statute down as applied to appellees or, better yet, upholding the constitutionality of the statute.

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IV.

In conclusion, the Supreme Court's jurisprudence regarding facial challenges forecloses us from striking down the honorarium ban on its face. Under controlling caselaw, appellees should be required to demonstrate that applying the ban to them would violate the First Amendment. They have failed to make that showing, as the admittedly prophylactic ban is narrowly tailored to serve the government's compelling interest in avoiding the appearance of corruption or impropriety in its workforce. Moreover, because the honorarium ban imposes only a moderate burden on employees' First Amendment rights, the *Pickering* balance favors appellants in this case. I would therefore reverse the judgment below. Because the majority has chosen to take a different course, I respectfully dissent.

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APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. Nos. 90-2922 (TPJ), 90-3027 (TPJ)
and 90-3044 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

PETER G. CRANE, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed Mar. 19, 1992]

MEMORANDUM AND ORDER

JACKSON, District Judge.

In November, 1989, Congress enacted comprehensive multititle legislation known as the Ethics Reform Act of 1989 (the "Act"), 5 U.S.C. app. §§ 501 *et seq.*, Pub.L. No. 101-

194, 103 Stat. 1760, intended to reinforce standards of integrity within the federal government, both in fact and in the public's perception. Among its manifold provisions the Act undertook to expand the existing restrictions upon off-the-payroll money-making activities of current federal officeholders in all three branches of the U.S. government. One of the activities Congress found suspect, as tending to corrupt (or appearing so), was the venerable practice of some government officeholders—most conspicuously, Members of Congress themselves—of accepting “honoraria,” i.e., generally a payment of more than token value, from private sources having more than a selfless interest in how the government governs, in return for some ostensibly unrelated and otherwise appropriate act or service, such as a speech to a business convention or an article for a trade journal. Title VI of the Act, imposing limitations on outside earned income, included a provision purporting to prohibit the receipt of honoraria by virtually anyone in federal service.

In these consolidated cases for declaratory and injunctive relief, two national unions (and one local union chapter) of federal employees, and numerous Executive Branch career civil servants individually, contend that Title VI of the Ethics Reform Act of 1989, to the extent it prohibits their acceptance of payments for their own lawful outside activities, imposes unconstitutional inhibitions on fundamental rights vouchsafed to them by the U.S. Constitution. They ask that the Court so adjudge and declare, and that the United States, and its several officials charged with enforcement of the Act, be enjoined from doing so as to them.

The individual plaintiffs are currently employed full-time by various Executive Branch departments and agencies of the U.S. government. None of the plaintiffs hold political appointments, elective office, or positions in the Legislative Branch. Each, using his or her own time and personal resources, and in

all respects in accordance with the regulations of their respective departments and agencies antedating the effective date of the Act, has written or spoken for valuable consideration on a variety of subjects.¹ The Act will prohibit their doing so in the future. They may continue to write or speak if they wish, but not for pay as they have done in the past.

The case is presently before the Court on cross-motions for summary judgment. No material issues of fact stand as an impediment.

Plaintiffs contend that the offending provision of Title VI, 5 U.S.C. app. § 501(b) (hereinafter “Section 501(b)”), violates their rights under the First and Fifth Amendments to the Constitution, and that the implementing regulations, issued by the Office of Government Ethics (“OGE”), 56 Fed. Reg. 1721 (1991) (to be codified 5 C.F.R. § 2636), are “arbitrary and capricious” in violation of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (“APA”).²

Section 501(b) states in pertinent part:

[a]n individual may not receive any honorarium while that individual is a Member [of Congress], officer or employee [of any of the three branches of the federal government].

¹ Plaintiffs include, for example, a Nuclear Regulatory Commission lawyer who writes on Russian history (Crame); a Voice of America editor whose many published articles are generally on matters of international economics (Deutsch); a microbiologist at the Food and Drug Administration who reviews dance performances for print and broadcast media (Jackson); a tax examiner for the Internal Revenue Service whose avocational writing is on outdoor and environmental subjects (Grant); and a civilian electronics technician for the U.S. Navy and a spare-time scholar/author on ironclad vessel technology of Civil War vintage (Putnam).

² The regulations promulgated by the OGE apply only to employees of the Executive Branch. 5 U.S.C. app. § 503.

"Honorarium" is defined in Section 505(3) as:

a payment of money or any thing of value for an appearance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative) to the extent that such expenses are paid or reimbursed by any other person, and the amount otherwise determined shall be reduced by the amount of any such expenses to the extent that such expenses are not paid or reimbursed.³

The statute thus prohibits employees from receiving compensation for such private activities as writing non-fiction articles, presenting papers at conferences or meetings, serving as expert witnesses, and giving lectures or conducting seminars in their fields of interest. Plaintiffs, federal employees who do some or all of the above as a second profession or avocation,⁴ face civil penalties and possible disciplinary action if they continue to receiving compensation for their expressive activities while the statute remains in effect.

No one or more of the relevant Supreme Court cases in the constitutional firmament so far cited by the parties afford a firm fix on the analysis appropriate to a decision in this case. The cases, however, establish what may be considered lines of position, and from the various points at which those lines of position intersect it is possible to dead-reckon to a result.

³ "Appearance" excludes "performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display." 56 Fed.Reg. 1725 (1991). "Speech" does not include "recitation of scripted material, as for a live or theatrical production," or the "conduct of worship services or religious ceremonies." 56 Fed.Reg. 1725 (1991). "Article" does not include "works of fiction, poetry, lyrics, or script." 56 Fed.Reg. 1726 (1991).

⁴ Also named as a plaintiff is National Treasury Employees Union ("NTEU") Chapter 143. NTEU brought suit on behalf of its members, and Chapter 143 is a named plaintiff because the statute has, it alleges, interfered with its ability to publish its newsletter.

I.

Plaintiffs assert for a start that Section 501(b) "directly and substantially" burdens their First Amendment rights of free speech by depriving them of any financial incentive to speak or write; in fact, in many cases it operates as a disincentive, in that they are unable even to recoup necessary out-of-pocket expenditures connected with their non-governmental writing or speaking activities. Defendants respond that the plaintiffs remain in all respects able to speak or write as they have in the past. They are simply no longer entitled to be paid for it. Thus, they say, Section 501(b) should be regarded as merely an "incidental and indirect" burden on plaintiffs' First Amendment rights.

Any lingering uncertainty as to whether a law operating as a financial disincentive to constitutionally protected expressive activity represents a "direct," as distinguished from an "incidental," burden, however, was dispelled by the Supreme Court's recent decision in *Simon & Schuster, Inc. v. New York State Crime Victims' Board*, ___ U.S. ___, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) holding that a state statute expropriating, for the victims' benefit, monies paid to an accused or convicted criminal for his or her first-person account of the crime violated the First Amendment. Acknowledging that the state's legislative purpose was to compensate for harm done, not to suppress the thought expressed, the Supreme Court nevertheless found the financial burden along a sufficient inhibition of protected speech to offend the Constitution although the speaker remained at liberty to speak for free.⁵

⁵ Financial or economic penalties of one sort or another imposed upon constitutionally protected conduct have consistently been held by the Supreme Court to represent a direct burden. *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S.Ct. 1722, 95 L.Ed.2d 209 (1987); *Riley v. National Federation of the Blind*, 487 U.S. 781, 108 S.Ct. 2667,

The law at issue in *Simon & Schuster* was, however, a "content-based" statute in the opinion of the Supreme Court. Only income derived from expressions of the criminal's "thoughts, feelings, opinions or emotions" regarding his crime was subject to confiscation. *Id.* 112 S.Ct. at 505. The state had "singled out speech on a particular subject for a financial burden that it places on no other speech and no other income," the Supreme Court said. Thus even an avowedly "compelling" state interest in "compensating victims from the fruits of crime" was insufficient to save such a law not "narrowly tailored" to that otherwise commendable end. *Id.* at 512.

Section 501(b) of the Act, on the other hand, is arguably "content-neutral." Any "speech" or "article" on any subject, or an "appearance" anywhere, by federal employees (excluding those purportedly excepted by the OGE regulations) is proscribed if done for pay. Thus *Simon & Schuster* is distinguishable, and is apposite to this case principally only insofar as it reinforces the conclusion as to the "direct" nature of the burden imposed by financial penalty laws on protected speech. The Supreme Court expressly declined in *Simon & Schuster* to address the distinctions, and formulate a rule for a content-neutral statute of similar import. *Id.*, fn. *, at 511.

II.

Content-neutral regulatory legislation that also operates nevertheless to inhibit constitutionally protected expressive activity has most recently been addressed by the Supreme Court in *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), upholding a municipal

101 L.Ed.2d 669 (1988); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). See also *Leathers v. Medlock*, ___ U.S. ___, 111 S.Ct. 1438, 113 L.Ed.2d 494 (1991).

regulation governing sound-amplification technology to be used for musical events in a city park.⁶ Observing that music no less than speech is protected by the First Amendment, but that abatement of excessive noise is of legitimate civic concern, the Supreme Court stated:

Our cases make clear . . . that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information,' (quoting *Clark v. CCNV*, 468 U.S. 288, 293 [104 S.Ct. 3065, 3069, 82 L.Ed.2d 221] (1984)).

Id. 491 U.S. at 791, 109 S.Ct. at 2753.

There was, of course, a "governmental interest" at least as significant as noise abatement in universal contemplation when Section 501(b) of the Ethics Reform Act of 1989 was under consideration by Congress. Abuses of the "honoraria" custom and practice were well-documented, as was the consequent erosion of public confidence in the integrity of the government, and had been common public knowledge for many years.⁷ And Section 501(b) certainly obstructs no "channel" of communication. So long as federal employees receive no profit for their expressive labors, the world is their stage.

⁶ See also *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981).

⁷ See, generally, Memorandum of Points and Authorities of *Amicus Curiae Common Cause in Support of Defendants*, May 20, 1991, pp. 6-12. See also *Buckley v. Valeo*, 424 U.S. 1, 26-27, 96 S.Ct. 612, 638-39, 46 L.Ed.2d 659 (1976).

But Section 501(b) does not purport to be a "time, place and manner" regulation such as that at issue in *Ward*. It prohibits all speech-for-profit by federal employees, no matter when or where, or the medium employed. It thus "discriminate[s] among speakers" (i.e., among federal office-holders and everyone else), and "impose[s] direct quantity restrictions" (i.e., a total ban), on compensated excessive activities of the former, albeit in a worthy cause. *Buckley v. Valeo*, 424 U.S. 1, 18, 96 S.Ct. 612, 634, 46 L.Ed.2d 659 (1976).

Section 501(b)'s defenders observe, however, that governmental employees have always (at least in recent times) been *sui generis* insofar as they may avail themselves of constitutional rights that private individuals enjoy without limitation. For nearly a half century the Supreme Court has recognized that certain liberties of the most fundamental sort for private citizens of a representative democracy may, consistently with the Constitution, be denied to the same citizens when they enter upon government employment. *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947) (upholding provisions of Hatch Act, § 9(a), prohibiting partisan political activity by federal employees, against challenges under First, Fifth, Ninth, and Tenth Amendments); see also *U.S. Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973).

III.

In the seminal modern case directly addressing the freedom of speech of civil servants in particular, as distinguished from their political activity, *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), the Supreme Court reversed a state court decision sustaining the dismissal of a public school teacher for publishing a letter critical of the board of education for whom he worked. The issue on which

the outspoken teacher had expressed himself being one of some public importance, the Supreme Court held, in the absence of proof that the teacher's own performance of duty had suffered, or that he had thereby interfered with the regulation operation of the schools generally, the school board's governmental interest in inhibiting his utterances was "not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.* at 573; 88 S.Ct. at 1737.

In so holding, however, the *Pickering* court observed that a government "has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." The constitutional validity of any such regulation depends upon the balance between the governmental interests "in promoting the efficiency of the public services it performs through its employees," and the interests of the employees, as citizens, "in commenting upon matters of public concern." *Id.* at 568, 88 S.Ct. at 1734.⁴

The defenders of Section 501(b) point to that *dictum* from *Pickering* as evincing a recognition by the Supreme Court that a sufficiently significant relationship between potentially disruptive "speech" by governmental employees and the efficiency of the civil service will legitimate an otherwise constitutionally dubious proscription. Section 501(b) is not, how-

⁴ What may be a "matter of public concern" may depend upon the eye of the beholder. Compare *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) (county employee's statement of approval of Presidential assassination constitutionally protected) with *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (assistant prosecutor's intra-office circulation of questionnaire critical of district attorney following her notice of unwanted transfer constitutionally unprotected as being a matter of "personal interest").

Plaintiffs here do not rely upon any presumed importance of their activities to the public weal to justify their right to pursue them for profit.

ever, addressed to the *speech* of public servants as such, whatever its subject matter, or even to expressive activity of any sort entitled to constitutional protection. It prohibits *conduct*, specifically, the receipt of money, and it is expressly intended to suppress an idea, or more precisely, a perception, accurate or not, which is altogether unworthy of any protection whatsoever, namely, that government favor may be bought, with payment to be made in the guise of an honorarium.

IV.

Turning to the seminal modern case addressing conduct-as-speech, or "symbolic speech," i.e., the expression of an idea by deed rather than word, *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), holds that Congress may constitutionally prohibit the intentional mutilation of draft cards notwithstanding it is done in protest of an unpopular governmental policy. The Supreme Court said that

[w]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. . . . [A] governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restrictions on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 376-77, 88 S.Ct. at 1678-79.⁹

⁹ Subsequent cases involving the constitutionality of the impact of regulatory legislation upon communication-by-conduct have concentrated primarily upon the extent to which the purpose of the legislation has been

V.

Applying the teaching of the foregoing cases to Section 501(b) of the Ethics Reform Act of 1989, certain principles are easily discerned.

First, it is abundantly clear, and by none disputed, that Congress has not only the constitutional power but the duty as well to promote the integrity of, and popular confidence in and respect for, the federal government. Indeed, it would be difficult to conceive of a governmental interest more vital to the survival of a democratic form of government.

Second, Section 501(b) is content-neutral to the extent it inhibits expressive activity by rendering it unremunerative. A federal employee is no less dissuaded by it from making public exhortations to civic virtue than from calls to arms in revolt.

Third, no issue is taken with the proposition that Section 501(b) is conduct- rather than expression-oriented. Corruption, not criticism, is its central target.

Fourth, plaintiffs here are all government employees who, as a condition of their employment, have relinquished certain First Amendment prerogatives that their fellow citizens in private life retain unfettered. One such prerogative is the right to speak freely, certainly on matters of purely personal interest, without concern for the possible harm it may do to the legitimate interests of their employer or the employer's anticipated displeasure.

Nevertheless, in each of the foregoing classes of cases the Supreme Court has found, as a *sine qua non* of constitutional legitimacy for regulatory legislation having the effect of sup-

to suppress expression rather than to accomplish a legitimate noncensorial objective. See, e.g., *Boos v. Barry*, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (statute prohibiting offensive displays in vicinity of foreign embassy unconstitutional); *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (statute prohibiting flag-burning as "desecration of venerated object" unconstitutional).

pressing freedom of expression to the slightest degree, that the law in question go no farther than necessary to accomplish its objective in vindicating even the most significant of governmental interests. Such a law must, as the Supreme Court has said time and again, be "narrowly drawn" or "finely tailored" to that end, and it must not discriminate between speakers or speech indistinguishable from one another insofar as its regulatory objective is concerned. See *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 955, 74 L.Ed.2d 794 (1983); *Carey v. Brown*, 447 U.S. 445, 461, 100 S.Ct. 2286, 2290, 65 L.Ed.2d 263 (1980). In neither respect, it seems, will Section 501(b) thus survive scrutiny.

The phenomenon of the sinister "honorarium" that Section 501(b) was expressly written to exterminate presupposed the conflux of private money and governmental power in a context in which the latter might be bent to the service of the former. It presumed some relationship between the federal officeholder/speaker and his audience giving rise to an apprehension (with or without justification) that payment for the speech was in reality payment for some occult benevolence the speaker was in a position to bestow.

Yet Section 501(b) is not so limited. No official nexus or relationship between the officeholder and those for whom he would speak or write is contemplated by the statute. Payments for a "speech" or an "article" are proscribed to federal employees even when there is neither the possibility nor a perception that the office and the payment are interdependent.

Moreover, Section 501(b) prohibits only speeches, articles, or appearances for profit by federal employees. It makes no mention of the myriad other forms of expression for which payments could lawfully be made to and received by the same employee on the same subject from the same supplicant in quest of the same governmental favor—a work of fiction such

—as a novel, for example, or a musical score; a painting; an object of handicraft; a lesson in some art or skill; a film or videotape; even a congratulatory letter or telegram—as OGE's implementing regulations clearly reflect (without, it should be noted, any legislative warrant).

In the case of *Carey v. Brown*, 447 U.S. 445, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980), the Supreme Court struck down a state residential-neighborhood anti-picketing statute, on Equal Protection as much as First Amendment grounds, because it contained an exception for picketing in connection with a labor dispute. Acknowledging that the purpose of the statute was to ensure the privacy in his home of the object of the picketing, the Supreme Court observed that the labor picketing it continued to allow was "equally likely to intrude on the tranquility of the home." *Id.* at 462, 100 S.Ct. at 2291.

First, the generalized classification which the statute draws suggests that [the state] itself has determined that residential privacy is not a transcendent objective: While broadly permitting all peaceful labor picketing notwithstanding the disturbances it would undoubtedly engender, the statute makes no attempt to distinguish among various sorts of nonlabor picketing on the basis of the harms they would inflict on the privacy interest. The apparent overinclusiveness and underinclusiveness of the statute's restriction would seem largely to undermine appellant's claim that the prohibition of all non-labor picketing can be justified by reference to the State's interest in maintaining domestic tranquility.

More fundamentally, the exclusion for labor picketing cannot be upheld as a means of protecting residential privacy for the simple reason that nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy. Appellant can point to nothing inherent in the nature of peaceful labor picketing that would make

it any less disruptive of residential privacy than peaceful picketing on issues of broader social concern. Standing alone, then, the State's asserted interest in promoting the privacy of the home is not sufficient to save the statute.

The second important objective advanced by appellant in support of the statute is the State's interest in providing special protection for labor protests.

* * * * *

The central difficulty with this argument is that it forthrightly presupposes that labor picketing is more deserving of First Amendment protection than are public protests over other issues. . . .

* * * * *

Appellant's final contention is that the statute can be justified by some combination of the preceding objectives. This argument is fashioned on two different levels. In its elemental formulation, it posits simply that a distinction between labor and nonlabor picketing is uniquely suited to furthering the legislative judgment that residential privacy should be preserved to the greatest extent possible without also compromising the special protection owing to labor picketing. In short, the statute is viewed as a reasonable attempt to accommodate the competing rights of the homeowner to enjoy his privacy and the employee to demonstrate over labor disputes. But this attempt to justify the statute hinges on the validity of both of these goals, and we have already concluded that the latter—the desire to favor one form of speech over all others—is illegitimate.

Id. at 465-68, 100 S.Ct. at 2292-94 (footnotes omitted).¹⁰

¹⁰ In a different but related context the U.S. Court of appeals for the District of Columbia Circuit has said, in invalidating a legislative provi-

Section 501(b) falls victim upon dissection to a similar appraisal. To the extent that it prohibits federal employees' acceptance of payments for all scholarly labors in speech or article form, no matter the absence of a relationship between the subject matter of their expressive works, their government jobs or their audience, or the identity and the motives of the persons who are paying for their efforts, it is over-inclusive. That it permits poets and musicians, or artisans and artists, to receive such payments while speechmakers and non-fiction writers cannot, despite the presence of a relationship giving rise to the suspicions that Section 501(b) sought to allay, the statute belies the notion that the governmental interest in suppressing questionable payments is *paramount* to all others, and renders it simultaneously under-inclusive.

VI.

It remains to be considered whether Section 501(b), or, more precisely, whether the section as applied to the Executive Branch federal employee/plaintiffs here, is severable from the remainder of the Act. It is axiomatic that severability

sion deemed by the Federal Communications Commission to give it regulatory authority to treat similarly situated broadcast licensees differently, that such "claims lie at the intersection of the First Amendment's protection of free speech and the Equal Protection Clause's requirement that government afford similar treatment to similarly situated persons." *News America Publishing, Inc. v. Federal Communications Commission*, 844 F.2d 800, 804 (D.C.Cir. 1988). "Where legislation affecting speech appears underinclusive, *i.e.*, where it singles out some conduct for adverse treatment, and leaves untouched conduct that seems indistinguishable in terms of the law's ostensible purpose, the omission is bound to raise a suspicion that the law's true target is the message. Accepting that intuition without making an actual determination of the legislators' motives, the Supreme Court has for the regulation of speech insisted on a closer fit between a law and its apparent purpose than for other legislation." *Id.* at 804-05.

questions are answered by reference to legislative intent. See *Sutherland Stat. Const.*, § 44.03 (4th Ed. 1986).

This legislation is notable for the absence of a paper trail left in the wake of its passage through Congress.¹¹ This would be curious for an Act of this magnitude, were it not for the fact that the legislation was partly the product of a Bipartisan Task Force of the House of Representatives, possibly sensitive to the prospect of unwelcome publicity for another of the provisions of the Act raising Congressional salaries. Although the legislative history yields no direct evidence of Congress' intention regarding severability, it is helpful in supplying information necessary for the Supreme Court's mandated analysis of how to proceed in the absence of direct evidence.

A succession of Supreme Court cases has held that, in the absence of a severability clause, or direct evidence of legislative intent, a statutory provision is presumed severable if what remains after severance "is fully operative as law." *I.N.S. v. Chadha*, 462 U.S. 919, 934, 103 S.Ct. 2674, 2665, 77 L.Ed.2d 317 (1983), citing *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234, 512 S.Ct. 559, 564, 76 L.Ed. 1062 (1932); see also *Regan v. Time, Inc.*, 468 U.S. 641, 652-53, 104 S.Ct. 3262, 3269, 82 L.Ed.2d 487 (1984). The severability inquiry evaluates "whether the statute will func-

¹¹ Such legislative history as exists can be found at: 135 Cong.Rec. H8747 (Nov. 16, 1989) (passed the House); 135 Cong.Rec. S15972 (Nov. 17, 1989) (passed the Senate); 135 Cong. H9253 (Nov. 21, 1989) (Report of the Bipartisan Task Force); 135 Cong.Rec. H9717 (Dec. 11, 1989) (a summary of the Act, as well as its full text); and 136 Cong.Rec. H1645 (April 24, 1990) (technical amendments, not relevant to the Provision at issue here).

Although the bill, as H.R. 3660, was referred jointly to the Committees on Rules, House Administration, the Judiciary, Standards of Official Conduct, Ways and Means, and Government Operations, only the Rules Committee issued a report.

tion in a manner consistent with the intent of Congress." *Alaska Airlines v. Brock*, 480 U.S. 678, 685, 107 S.Ct. 1476, 1480, 94 L.Ed.2d 661 (1987) (challenge to employee protection provision of Airline Deregulation Act) (emphasis in original).

[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.

*Id.*¹² Indeed, the Supreme Court has proclaimed a general bias toward preserving the vitality of as much of a Congressional enactment as possible in its familiar pronouncement that the "cardinal principle of statutory construction is to save and not to destroy." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30, 57 S.Ct. 615, 621, 81 L.Ed. 893 (1937); see also, *Tilton v. Richardson*, 403 U.S. 672, 684, 91 S.Ct. 2091, 2098, 29 L.Ed.2d 790 (1971).

There are several reasons that yield the conclusion that Section 501(b) is severable. First, the Report of the Bipartisan Task Force (issued after the Act had been passed (discloses that it was the honoraria-related activities of *Members of Congress* that gave greatest concern, indicating that the prohibition on the receipt of honoraria by other members of the government workforce was not of pivotal importance to pas-

¹² See also *Brockett v. Spokane Arcades*, 472 U.S. 491, 502, 105 S.Ct. 2794, 2801, 86 L.Ed.2d 394 (1985) (holding that a moral nuisance statute with an overbroad definition of "prurient" should not have been struck down in its entirety, since the statute without the offending provision retained its effectiveness as regulation of obscenity). The Court cited its own language from 1881, that "the same statute may be in part constitutional and in part unconstitutional, and [] if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." *Allen v. Louisiana*, 103 U.S. 80, 83-84, 26 L.Ed. 318 (1881).

sage of the Act. Witness, for example, the Task Force's description of the purpose of the honoraria limitations predating passage of the Act:

The current limitations are outside earned income and honoraria were prompted by three major considerations: First, substantial payments to a *Member of Congress* for rendering personal services to outside organizations presents a significant and avoidable potential for conflict of interest; second, substantial earnings from other employment is inconsistent with the concept that being a *Member of Congress* is a fulltime job; and third, substantial outside earned income creates at least the appearance of impropriety and thereby undermines public confidence in the integrity of public officials.

135 Cong. Rec. H9256 (Nov. 21, 1989) (emphasis added). The Task Force Report, even though ultimately recommending a ban on *all* honoraria for *all* employees, follows the foregoing passage with numerous paragraphs suggesting that only the honoraria received by *Members of Congress* was at issue. The entire discussion relates to the growth in numbers and amount of honoraria accepted by Members; tax shelters set up by Members; the increasing evidence of an intent to purchase the vote of Members on the part of those offering honoraria, and so forth. Nothing is said to suggest that the extension *vel non* of Section 501(b) to all federal employees was a "dealbreaker" provision, and the bill was ultimately passed with provisions that treated even honoraria for Representatives and Senators separately and differently.

Second, there is little in the floor debates to suggest that Section 501(b) was of such paramount importance and that the Act would not have survived without it. Although there is some language that suggests that an "honoraria ban" gener-

ally was the "heart" of the ethics reform effort,¹³ the references to it on the floor of Congress, as in all other places, appear in context implicitly to address the restrictions on the receipt of honoraria by Representatives and Senators only. Much of such language as pertains to honoraria at all is purely rhetorical and hyperbolic, and it is obvious from the many pages of debate on matters other than the honoraria issue that Congress was *not* particularly preoccupied with Executive Branch civil servants covertly manipulating their functions to the advantage of private interests by taking payment for articles and speeches.

It is abundantly clear, however, from the entire history of the Act, that what Congress was principally concerned about was a Member of Congress receiving money from a constituent group in such a fashion that it created an appearance of impropriety and of undue influence.¹⁴ In summary, there are a

¹³During the course of the debate in the Senate on Nov. 17, 1989, Sen. Mitchell expressed the view that the honoraria ban is the "heart of the principal reform in ethics in this legislation." 135 Cong. Rec. S15972. Sen. Grassley, responding, disagreed that this was so. 135 Cong. Rec. S15973-74.

¹⁴In the House, on November 16, 1989, for example, Rep. Martin introduced the bill stating:

[The bill] reforms the ethics processes of the House, removes the stigma that this House . . . can be used or misused by outside interests, and I hope will begin to restore a measure of faith that must be had between those who govern and those who are the governed. . . . It was a genuine concern for the future of this House and our own reputations as Members that drove the ethics reform process.

Comments of Rep. Martin, 135 Cong. Rec. H8747-48 (1989) (emphasis added). Similarly, Rep. Weiss stated that, "Perhaps the single most important part of this package is the ban on honoraria for *Members of the House*." Comments of Rep. Weiss, 135 Cong. Rec. H8767 (Nov. 16, 1989) (emphasis added).

wide variety of reasons to conclude that Congress would have enacted the Ethics Reform Act of 1989 even without the extension of Section 501(b) to all federal employees, whether or not it would have done so had the House of Representatives escaped its clutches.

For the foregoing reasons, therefore, it is, this 19th day of March, 1992,

ORDERED, ADJUDGED, and DECLARED, that Section 501(b) of the Ethics Reform Act of 1989, 5 U.S.C. app. §§ 501 *et seq.*, Pub.L. No. 101-194, 103 Stat. 1760 (1989) is unconstitutional insofar as it applies to Executive Branch employees of the United States government, and it is

FURTHER ORDERED, that defendants United States of America, William P. Barr, and Stephen D. Potts, in their official capacities, and their officers, agents, servants, employees, attorneys, and all other persons in active concert or participation with them, are hereby permanently enjoined from enforcement of Section 501(b) against any Executive Branch employee of the United States government alleged or believed to be in violation thereof, and it is

FURTHER ORDERED, that this judgement, and the permanent injunction entered hereby, are stayed pending completion of proceedings on any timely appeal taken herefrom.¹⁵

¹⁵ The Court was informed by the parties on December 4, 1991, that legislation was introduced in the House of Representatives as H.R. 3341, and passed by that chamber on November 25, 1991, purporting to amend Section 501(b) to eliminate the honoraria ban for federal employees if the speech, article or appearance for which they are paid, and the payment itself, are unrelated to the employees' official duties or status.

The Court was also informed that H.R. 3341 was prevented of consideration by the Senate by the objection of a single U.S. Senator, as the Senate rules permit him to do. Consequently, the first session of the 102d Congress adjourned November 27, 1991, without enacting legislation correcting the constitutional infirmities of Section 501(b).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

No. 92-5085

NATIONAL TREASURY EMPLOYEES UNION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

[Filed Sept. 21, 1993]

Before: WILLIAMS, SENTELLE and RANDOLPH, Circuit Judges.

ORDER

Upon consideration of the petition for rehearing of the United States and of the response thereto, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

For the Court:

Ron Garvin, clerk

BY: /s/ Robert A. Bonner

ROBERT A. BONNER

Deputy Clerk

Circuit Judge Sentelle would grant the petition for rehearing.

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APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT**

No. 92-5085

NATIONAL TREASURY EMPLOYEES UNION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

AND CONSOLIDATED CASES

[Filed Sept. 21, 1993]

Before: MIKVA, Chief Judge; WALD, EDWARDS, SILBERMAN,
BUCKLEY, WILLIAMS, D. H. GINSBURG, SENTELLE, HENDERSON,
and RANDOLPH, Circuit Judges.

ORDER

The Suggestion For Hearing *En Banc* of the United States and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

81a

Per Curiam

For the Court:

Ron Garvin, clerk

BY: /s/ Robert A. Bonner

ROBERT A. BONNER

Deputy Clerk

Circuit Judge Sentelle would grant the suggestion.

A statement of Circuit Judge Williams concurring in the denial of rehearing *en banc* is attached.

A statement of Circuit Judge Silberman dissenting from the denial of rehearing *en banc* is also attached.

NTEU v. USA, No. 92-5085

WILLIAMS, *Circuit Judge*, concurring in denial of rehearing and rehearing *en banc*: Judge Silberman raises the tempting proposition, ignored by the parties to this litigation, that by moving the closing end of a parenthesis in the definition of "honorarium" we might transform the statute into one of virtually undoubted constitutionality. I believe the panel correctly resisted this temptation.

As enacted, the amended definition of honorarium reads as follows:

The term "honorarium" means a payment of money or anything of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government) by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual

5 U.S.C. App. 7 § 505(3).

Under Judge Silberman's microsurgery, the end of the parenthesis is moved up, so that the definition—and thus the ban—applies *only* to appearances, speeches and articles related to the employee's duties or for which the payment relates to his or her status with the government. Thus:

The term "honorarium" means a payment of money or anything of value for an appearance, speech or article (including a series of appearances, speeches, or articles) if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual

Before addressing the substance of this revision, we should consider its syntax, which bears no resemblance to English. The prepositional phrase "by a Member, officer or employee" appears superficially to be a part of the subject-or-status limitation; once the reader recognizes that it is not, he must set off on a wholly unguided search for the terms the phrase really modifies ("an appearance, speech or article").¹

Judge Silberman's justification for his adjustment rests on some legislative history and on the view that the statute is illogical as written. The legislative history—like so much legislative history—is highly ambiguous and the statute as written is by no means so irrational as to warrant our rewriting it.

¹ The draftsmen could have attained the aim inferred by Judge Silberman with no such confusion. For example:

The term "honorarium" means a payment of money or anything of value for an appearance, speech or article by a Member, officer or employee, if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government, except that the term excludes any actual and necessary travel expenses incurred by such individual. . . .

The only directly relevant item of legislative history is the following observation of the conference committee:

Subsection (b) amends the definition of 'honorarium' to include payment for a 'series of appearances, speeches or articles,' if the subject matter is related to the individual's duties or payment is made because of the individual's status with the Government, rather than only payment for a single event.

H.R. Conf. Rep. No. 176, 102d Cong., 1st Sess. 12 (1991); see also Silberman, J., *infra* at [5] (emphasizing the word "include").

The committee's observation is quite consistent with the wording used by Congress in the statute. As enacted, the amended statutory definition *does* "include" a series of appearances, speeches or articles when the conditions specified in the parenthesis, and in the committee report, are present. The legislative history provides no license to start shuffling parentheses around.

The same is true if we focus on the way in which the 1991 amendment *changed* the pre-existing law. The unamended law obviously encompassed receipt of payment for a series of speeches. Before the amendment it would have been an odd defense, and surely a losing one, for an employee to say, "Not guilty—I took payment for *three* speeches, not one." As the implementing regulations promulgated by the Office of Government Ethics ("OGE") confirm, people understood the unamended statute to treat a series exactly like a single event. "An economist employed by the Department of the Treasury," went one of the OGE's examples, "has entered into an agreement with a speakers bureau to deliver ten afterdinner speeches to be arranged by the speakers bureau over a 6 month period. The employee may not receive the contract fee of \$10,000." 56 Fed. Reg. 1721, 1725 (1991).²

² To reflect the 1991 amendment, the OGE's Implementing regulations now specify that the ten speeches are unequivocally barred if they

Since the original act treated a series of speeches the same as a single speech, the only plausible reason for adding a reference to a series of speeches must have been to treat them differently.

Citing a Senate committee report saying that under the pre-amendment ban a federal employee "can teach a full semester course on a particular subject, but cannot be paid for a single lecture on the same subject", S. Rep. No. 29, 102d Cong., 1st Sess. 5 (1991), Judge Silberman argues that *Congress* did not think that the unamended statute covered payments for a series of events. See Silberman, J., *infra* at [12]. But the exception for teaching arose not from any distinction between a series and a single event but from the statute itself. The Ethics Reform Act of 1989 barred Members of Congress, officers of the federal government, and high-level federal employees other than career civil servants from receiving compensation for teaching *unless* they secured "the prior notification and approval" of the appropriate entity. Pub. L. No. 101-194, 103 Stat. 1761 (1989); see 5 U.S.C. App. 7 § 502(a)(5) (1992). The plain implication, as the commentary to regulations issued by the Judicial Conference of the United States explains, was that "the prohibition on receipt of honoraria does not foreclose teaching for compensation." 2 Administrative Office of the United States Courts, *Guide to Judiciary Policies and Procedures* V-41 (1991). Thus, OGE's implementing regulations excluded from the honorarium ban "[c]ompensation for teaching a course involving

are "unrelated." See 5 CFR § 2636.203(a) (Example 3). The OGE, unlike Judge Silberman, reads the amended statute to mean what it says; the OGE regulations stipulate that the honorarium ban does not cover "[p]ayment for a series of three or more different but related appearances, speeches or articles, provided that the subject matter is not directly related to the employee's official duties and that the payment is not made because of the employee's status with the Government." 5 CFR § 2636.203(a) (13).

multiple presentations by the employee offered as part of the regularly established curriculum of an institution of higher education." See 56 Fed. Reg. 1725 (1991).

Moreover, the Senate committee was not concerned with some fantastic loophole for multiple speeches but with the ban's unduly harsh treatment of activities other than teaching. The committee's bill accordingly sought to introduce a broad subject-or-status limitation for "an appearance, a speech, or an article", language the committee used to cover both isolated events and elements of a series. See S. Rep. 102-29 at 17. *But Congress never enacted this broad limitation.* Instead, the 1991 amendment left in place the flat ban on honoraria for isolated events, while relaxing it for a series. In sum, Congress never supposed that the ban exempted multiple speeches (other than those encompassed in the special treatment of teaching), and the effort to impose a general subject-or-status limitation fizzled.

As to the sense of the amended statute: Congress may well have thought that the added effort required for a government official to make a series of speeches, etc. (not to mention the added effort of his listeners) provided an inherent limitation on this avenue of corruption, justifying a more relaxed approach. To be sure, this limitation is not perfect. It may take no more effort to write a series of three 10,000-word articles on a single subject than to write one 30,000-word article. What is more, as the illicit effect of the payment will turn in part on its relation to the worker's effort, payors could achieve their corrupt purposes simply by boosting the payment.

Still, there is another reason why Congress might have treated honoraria for isolated events or articles more strictly than honoraria for a series. If a Member of Congress or a government employee is making *repeated* paid appearances before a particular group, his connection to the group is likely to be more open and more visible to the public (or the public's

watchdogs) than if he had simply accepted a one-time payment for a single appearance. Congress might reasonably have concluded that corruption is less likely under such circumstances.

* * *

Judge Silberman goes on to support *en banc* treatment on the premise that we might wisely excise from circuit law the application of a "narrow tailoring" test to restrictions on the speech of government employees. See Silberman, J., *infra* at [15], citing *McGehee v. Casey*, 718 F.2d 1137, 1143 (D.C. Cir. 1983) (applying narrow tailoring test). Before the Supreme Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), repudiated the idea that the "narrow tailoring" concept encompassed a "least restrictive means" test in cases not subject to strict scrutiny, *id.* at 796-802 & n.6, this proposal would have raised a most interesting issue. Post-*Ward*, however, it is apparent that "narrow tailoring" is itself a balancing test, under which courts inquire whether the disputed ban "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Id.* at 799; see also *Henderson v. Lujan*, 964 F.2d 1179, 1184 (D.C. Cir. 1992). Thus "narrow tailoring" seems to add little more than metaphor. See *id.*³

Judge Silberman apparently disagrees. Courts review restrictions on the speech of government employees, he observes, by balancing "the interests of the [employee], as a

³ Judge Silberman's "understand[ing]" the panel opinion to invalidate an honorarium ban "so long as the court believes even one employee who should be permitted to speak for pay is not permitted [to do so]", see Silberman, J., at [19], is of course a *misunderstanding*. Such a position would ignore the *Ward* Court's use of the word "substantially". The panel invalidated the ban only after finding that it "reach[ed] a lot of compensation that has no nexus to government work that could give rise to the slightest concern", slip op. at 11, and after reviewing the line-drawing concerns that might have justified the broader ban, *id.* at 11-14.

citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Silberman, J., *infra* at [13], quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). Judge Silberman acknowledges that overbreadth can cause a restriction to fail this generalized balancing test, for "[w]hen the government burdens substantially more speech than 'required' by its asserted interest, then its asserted interest might not outweigh that greater burden." *Id.* at [15]. But he indicates that substantial overbreadth is not *always* fatal; as long as the legitimate interests served by restricting the speech of government employees outweigh the burdens caused by the restriction, the restriction passes constitutional muster even if the restriction's *scope* is substantially broader than the goal supports.

But if the burdens caused by a restriction on speech are substantially greater than is appropriate to achieve the government's legitimate end, taking all line-drawing problems into account and according the political branches' judgement due weight, it is hard to see what interest justifies the excess burdens. They appear wholly unsupported, for by hypothesis the government could amply achieve its purposes by enacting a narrower restriction. As a practical matter, then, the generalized *Pickering* balance and the "narrow tailoring" test seem unlikely to yield different results.

Assuming that a "narrow tailoring" test *does* add to what is implicit in the concept of balancing, moreover, the signs from the Supreme Court appear quite consistent with applying such a test to restrictions on the speech of government employees. In *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), the Court upheld the Hatch Act only after considering whether certain provisions rendered it "fatally overbroad". *Id.* at 580. In *Pickering* the Court reserved judgment on "the extent to which teachers can be required by

narrowly drawn grievance procedures to submit complaints about the operation of the schools to their superiors for action thereon prior to bringing the complaints before the public." 391 U.S. at 572 n.4 (emphasis added). And in *Brown v. Glines*, 444 U.S. 348 (1980), in upholding Air Force regulations that required members of the service to get the appropriate commander's approval before soliciting signatures for petitions on Air Force bases, the Court stated its grounds in terms that almost exactly pre-figured *Ward's* formulation of "narrow tailoring", saying that "the Air Force regulations restrict speech no more than is reasonably necessary to protect the substantial governmental interest." *Id.* at 355.

In any event, the "narrow tailoring" test applies to government restrictions on speech on a government-owned "public forum", and I question whether the government's interest as *employer* is so distinct from its interest as *proprietor* as to justify applying a markedly different test (assuming that were to flow from Judge Silberman's proposal). At any rate, there seems no reason to rush into an *en banc* on questions that no party has raised.

NTEU v. USA, No. 92-5085

SILBERMAN, *Circuit Judge*, dissenting from the denial of rehearing *en banc*: The panel opinion declared an act of Congress governing the acceptance of speaking fees (honorarium) on the part of officers and employees of all three branches of government unconstitutional on its face as it would apply to the entire executive branch—not the legislative or judicial branch. The intrinsic importance of such a decision is hardly to be questioned. But I think the case is particularly deserving of rehearing, because I doubt that it is necessary to decide the constitutional question. The district court's opinion, which the panel affirmed, paradoxically, declared uncon-

stitutional the *unamended* version of a statute that had been amended before the court's decision (and the court considered outdated executive branch regulations implementing the statute). Although the panel noted the statute's amendment, it did not explicitly consider the amendment's significance and the possibilities it offers in avoiding the constitutional question. Even if it were necessary to decide the statute's constitutionality, I am inclined to think we should employ a quite different constitutional analysis and supply a different remedy. The panel, overlooking what seems to me to be the most obvious remedial order, one that would strike down only the arguably offensive part of the statute, instead unjustifiably views executive branch employees more favorably than congressional and judicial employees and inexplicably—presumably because inexplicable—struck down a portion of the statute which is unquestionably constitutional.

A.

Congress, in November, 1989, seeking to place new and more stringent restrictions on the receipt of "outside" income by governmental employees than previous laws and regulations had provided, enacted a series of amendments to the Ethics in Government Act of 1978. Although the debates surrounding the adoption of perhaps the most controversial aspect of this legislation—a flat ban on the receipt of "honoraria"—focused largely, if not exclusively, on the need for such a ban to halt the receipt of honoraria by *members of Congress*, the act as passed applied that unqualified ban to virtually all government employees. These amendments, collectively entitled "The Ethics Reform Act of 1989," ("Reform Act") Pub. L. No. 101-194, became effective on January 1, 1991, and the Office of Government Ethics promulgated implementing regulations on January 17. See 56 Fed. Reg. at 1721.

As originally enacted, and as currently written, the Reform Act provides: "An individual may not receive any honorarium while that individual is a Member, officer or employee." 5 U.S.C. App. 7 § 501(b). As originally enacted, but *not* as currently written, the act defined the term "honorarium" as "a payment of money or anything of value for an appearance, speech or article by a Member [of the House of Representatives], officer or employee, excluding any actual and necessary travel expenses. . . ." See Pub. L. No. 101-194, Title VI, § 601(a), 103 Stat. 1760 (1989). Thus, the original Reform Act created a flat ban on the receipt of honoraria by virtually all governmental employees, but did not apply that ban to senators.¹

Within a very short time after the enactment of the Reform Act, a strong sentiment seems to have emerged in Congress that the flat ban applicable to all governmental employees was unwarranted (and, indeed, probably unintended). At the end of 1990—even before the effective date of the Reform Act—the Senate *unanimously* passed a bill that would have replaced the flat ban on the receipt of honoraria with a limited prohibition against the receipt of honoraria by government employees where the subject matter of the writings directly related to the employees' official duties or where the payment was related to the officers' status. See S. Rep. No. 29, 102d Cong., 1st Sess. 2 (1991). That bill drew no distinction between one-time speeches and a "series" of speeches. *Id.* at 2, 16-17. The House failed to act on the bill before it recessed, and it did not become law. *Id.* at 2.

On January 22, 1991, only days after Congress had reconvened, Senators Glenn and Roth again introduced a bill, S. 242, that "was the same in substance" as the bill introduced

¹ The Senate voted against a ban on honoraria, but, unlike the House, it did not accept the pay raise passed as part of the ethics package.

the previous year.² S. Rep. at 2. S. 242 had no fewer than 30 co-sponsors. See *id.* It was referred to the Committee on Governmental Affairs, which reported the bill favorably to the Senate without dissent. See *id.* at 2-3. In fact, there is no indication that any senator ever doubted the desirability of amending the Ethics Reform Act so as to modify the flat ban on the receipt of honoraria by governmental employees. As the Senate Committee noted, "Congressional debate concerning the honoraria [when the original act was passed] focused on the importance of prohibiting honoraria for high-ranking Government officials, especially members of Congress," and "[l]ittle attention was paid" to the question of lower-level governmental employees. *Id.* at 3-4. Thus, the "impact of the honoraria ban on rank-and-file employees [only] became apparent late [in 1990], prompting the legislative effort to modify it." *Id.* at 4.

Contemporaneous with the legislative efforts to amend the Reform Act to remove the flat ban on employee honoraria, Congress began considering its annual appropriations bill which, *inter alia*, set salaries for members of Congress. That bill, which was enacted into law as the Legislative Appropriations Act of 1991 ("Appropriations Act"), Pub. L. No. 102-90, 105 Stat. 447 (1991), provided for an increase in senators' pay, in "exchange" for which the Senate agreed to subject itself to the limitations on honoraria and outside income incorporated in the Ethics Act of 1989. See Pub. L. No. 102-90, Title I, Title III § 6(b) (2), 105 Stat. 447 (1991). Accordingly, the appropriations bill that passed the Senate made a number of appropriate "technical" amendments to the Ethics Reform Act. See 137 Cong. Rec. S10,267 (daily ed.

² A virtually identical bill, H.R. 3341, was originally introduced in the House as H.R. 325 on January 3, 1991. See H.R. Rep. No. 385, 102d Cong., 1st Sess. 7 (1991).

July 17, 1991). None of those amendments would have affected the definition of "honorarium."

Less than two weeks after passage of the Senate and House bills, the conference committee appointed to resolve differences between the bills submitted its report for approval by the House and Senate. *See* H.R. Conf.Rep. No. 176, 102d Cong., 1st Sess. (1991). The report included—and it is the first reference to the concept—an amendment modifying the definition of the term "honorarium" in the Ethics Reform Act. The following words were added to section 505(3): "(including a series of appearances, speeches, or articles, *if* the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government)" *emphasis added*). *See id.* at 5. The appropriations bill, including this language, passed the House on a voice vote with little debate. *See* 137 Cong.Rec. H6149, 6159 (daily ed. July 31, 1991). Although debate in the Senate was spirited, discussion focused largely on the question of the senators' pay raise. *See* 137 Cong.Rec. S11986-11989 (daily ed. Aug. 2, 1991). Neither House addressed the rationale for amending the honorarium language. The only direct indication of the conference committee's purpose in adding this rider is the following sentence in the committee report: "Subsection (b) amends the definition of 'honorarium' to *include* payment for a 'series of appearances, speeches, or articles,' if the subject matter is related to the individual's duties or payment is made because of the individual's status with the Government, rather than only payment for a single event." *See* H.R. Conf.Rep. No. 176, at 12 (*emphasis added*). The report thus implies that by amending the Reform Act Congress sought to treat a "series" of lectures in the *same manner* as a single lecture for purposes of the honorarium ban. This amendment (the "Appropriations Rider") became effective on January 1, 1992, and the Office of Government Ethics implemented new

regulations incorporating the new honorarium definition on January 8, 1992. *See* 57 Fed. Reg. 601 (1992).

The definition of "honorarium," as amended, now reads:

The term "honorarium" means a payment of money or anything of value for an appearance, speech or article (including a series of appearances, speeches, or articles *if* the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government) by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual. . . .

5 U.S.C. App. 7 § 505(3) (*emphasis added*).

Following passage of the Appropriations Act Rider, S. 242—which had once already passed the Senate unanimously and the purpose of which was to remove the flat ban on the receipt of honoraria by government employees—dropped off the legislative agenda.

These consolidated actions were first filed in the district court in December, 1990, even before the effective date of the Reform Act. The plaintiffs' affidavits, filed in the lower court actions, were all prepared prior to the act's amendment, at a time when the act provided for a flat ban on honoraria. The affidavits are therefore, to say the least, unhelpful in determining whether the affiants' conduct even falls within the amended ban.

Be that as it may, the lower court's judgment was issued in March, 1992—three months *after* the effective date of the 1991 Appropriations Rider. The district court opinion nevertheless quotes the prior and by-then repealed definition of "honorarium," and in so doing cites to the wrong version of the implementing regulations. *See NTEU v. USA*, Civ. Act. No. 90-2922, Mem. Op. at 4 (D.D.C. Mar. 19, 1992). The district court based its opinion that the act was unconstitutional on its

face on the grounds that it contained a complete *flat* ban on the receipt of honoraria by federal employees. The court never construed the *amended* statute to determine whether it too included such a ban (perhaps because it was not brought to the court's attention), nor did it decide whether the plaintiffs' conduct was proscribed by the amended statute. And as I have noted, the panel did not focus on this issue either.

B.

Federal courts are obliged to avoid constitutional issues if possible. Accordingly, "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Blodgett v. Holden*, 275 U.S. 142, 148. We followed that course only a few months ago, see *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, No. 93-5086, slip op. at 14, 23-24 (D.C. Cir. June 22, 1993). To be sure, it does appear that both parties litigated the case on the assumption that the statute's amendment—limiting honoraria for a series of speeches *only if* the speeches implicate the duties or status of the government employee—was of no significance. It is certainly understandable, therefore, that the panel majority and the dissenting judge would not have focused on the possibility of a limiting construction of the statute. We need not, however, ignore the actual language of the statute in order to resolve the dispute the parties put before us. See *United States Nat'l Bank of Oregon v. Independent Ins. Agents of America*, 113 S.Ct. 2173, 2177-78 (1993) (" '[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law,' even where the proper construction is that a law does not govern because it is not in force" (citation omitted)). Indeed, we had previ-

ously recognized our particular obligation to consider an argument not precisely raised if to do so avoids a constitutional issue. See *Meredith Corp. v. FCC*, 809 F.2d 863, 872 (D.C. Cir. 1987).

In striking the statute down, the majority repeatedly refers to the statute's so-called flat ban as evidence of its overbreadth. Yet, whatever else the statute as amended means, it certainly no longer creates such a "flat ban"—at least when the speech implicated takes the form of a "series." This is hardly insignificant. Of the parties suing in their individual capacities, it may well be that *none* are engaged, or planning to engage, in conduct prohibited by the amended statute. As to these parties, at least, the judgment below—which applied a by-then repealed statute—should be reversed and the cause remanded for an application of the amended statute to their conduct.³

But what I find even more troubling is that the panel decision does not consider the distinct—indeed highly probable—possibility that the 1991 Appropriations Rider contained a simple unintended mispunctuation. Cf. *National Bank of Oregon*, 113 S.Ct. at 2182-84 (holding that a statute's punctuation may be disregarded where necessary to enforce congressional intent, and concluding that the quotation marks there at issue

³ Because the plaintiffs' affidavits were filed before the 1991 amendment was passed, those affidavits are often ambiguous as to whether or not the affiants in question were engaged in a "series" of lectures. Nevertheless, it seems relatively clear that at least some of the actions filed below no longer state a claim. To take but one example, the National Treasury Employees Union, suing on its own behalf, claims that it is injured by the fact that under the flat ban imposed by the old act it could not continue to pay a government employee to write its monthly newsletter. See Affidavit of Charles Giunta, J.A. at 79. Under the *amended* statute and the O.G.E. regulations, however, such an arrangement would clearly be permissible as constituting a series of articles. See 5 C.F.R. § 2636.203(a) (13), example 6.

were misplaced).⁴ It seems likely to me that Congress intended the parenthesis beginning with "or" to end *before* the clause beginning with "if," with the result that section 505, properly read, does not create a flat ban on the receipt of honoraria by governmental employees *at all*—whether or not their speech took the form of a single address or a series.⁵

There would appear to be only two possible constructions of the statute. The first would read the statute, as amended, as retaining the flat ban on the receipt of honoraria by employees for single speeches, while removing such a ban for the delivery of a "series" of such speeches, so long as those speeches concern subjects unrelated to the officers' employment. The difficulty with this reading, aside from the fact that it strains logic to understand why anyone would seek to draw a distinction between compensation for a one-time speech and a "series" of speeches, is that there is simply no indication that Congress intended to draw that distinction, or that it felt a need to amend the Reform Act along *that* line when it acted in August, 1991. On the contrary, the sole sentence addressed to this amendment in the Conference Committee Report strongly suggests that Congress intended to amend the act in a way that

⁴ That possibility is all the more likely given the limited time between the amendment's incorporation as a rider to the appropriations bill and that bill's passage, as well as the fact that Congress' focus was clearly on other matters: namely, the question of the senators' pay raise in the midst of a recession.

⁵ In other words, the statute should read:

The term "honorarium" means a payment of money or anything of value for an appearance, speech or article (including a series of appearances, speeches, or articles) if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual. . . .

would treat one time acts and a "series" of acts under the same doctrinal framework. Given this background and in light of the constitutional difficulties entailed, I doubt very much that we should insist on reading the statute in the literal manner required by its current punctuation—especially when the result is to create an apparent anomaly in meaning. No party even suggests that Congress intended a distinction between single speeches and a "series" of speeches.

The second possible reading, one that views the close parenthesis mark as simply misplaced, would read the amended definition as subjecting both single speeches and a "series" of such speeches to the same doctrinal proviso: that is, that honoraria for both *may* be accepted, so long as the speeches in question do not relate directly to the official's duties or status. Unlike the first reading, this construction is both logical and, far more important, consistent with the legislative history that reveals a strong contemporaneous desire in Congress to amend the Ethics Reform Act so as to *remove* the flat ban on lower-level governmental employees. After all, we do know that there was a strong and unopposed contemporaneous congressional desire to amend the honoraria ban in order to remove the flat ban that had then applied to governmental employees.

Judge Williams, in his concurrence to this order, maintains that my suggested alternative reading of the language is not linguistically permissible. "[I]t bears no resemblance to that of English." See Opinion Concurring in the Denial of Rehearing *En Banc*, *supra*, at [2]. But, surely if Congress had actually put the close of the parenthetical where I would place it, no one would have difficulty understanding the meaning of the passage. Judge Williams also suggests that because it "surely" would have been a losing defense for an employee to argue that the unamended ban prohibited only single speeches and not a series of such speeches in amending the act explicitly to include a "series," Congress must have intended to draw a

distinction between single speeches and a "series" of such speeches. See Opinion Concurring in the Denial of Rehearing *En Banc*, *supra*, at [3]. Apparently, that was not Congress' judgment. The report issued by the Senate committee that was studying proposed amendments to the Ethics Reform Act in April of 1991—only four months prior to the amendment in question—concluded otherwise.⁶ Referring to the *unamended* version of the ban and in justification of its proposed amendments, the committee observed:

Ironically, the [unamended] honorarium ban prohibits fees only for certain speaking and writing, while leaving undisturbed the ability of federal employees to earn outside income from a wide variety of other "moonlighting" activities. . . . *An employee can teach a full semester course on a particular subject, but cannot be paid for a single lecture on the same subject.*

S. Rep. No. 102-29, at 5 (emphasis added). The legislative history thus suggests that Congress itself *was* concerned with the potentially disparate treatment, to which the unamended act subjected single lectures and a "course" of lectures, and that it intended to *remove* that potential disparity. Congress' *inclusion*, then, of a "series" of lectures in its 1991 amendment, far from creating an inference that it sought to treat single speeches and a series of such speeches differently, was apparently motivated by quite the opposite desire. In short, the 1991 amendment sought to accomplish two objectives simultaneously: it clarified that the honorarium ban reached single speeches and a "series" of speeches alike and limited the ban on *both* pursuant to a "status or subject matter" test. Unfortunately, as so often occurs when legislation is fashioned hurriedly, the draftsmen simply appear to have made a mistake.

⁶ This report was appended to NTEU's appellate brief.

In response to my point that it simply makes no sense for Congress to have wished to treat one speech differently than a series, Judge Williams heroically suggests a number of possible justifications for such a distinction. I find his hypothetical congressional logic quite unconvincing—indeed farfetched—but, more important, there is not the slightest indication that Congress ever entertained Judge Williams' hypothetical reasoning. No one, as far as I know, prior to Judge Williams' concurrence (certainly not the parties), has ever even suggested that Congress thought that the added effort to give a series of paid speeches—presumably two rather than one—is a deterrent to corruption. Perhaps only those who have not heard many politicians or bureaucrats speak, and are more used to academic lectures, would assume that those speeches would require *any* effort or would need significant freshening. And the notion that a government official who speaks for pay more than once (twice?) to a group is less likely to be corrupted than one who speaks for compensation only once because the latter's behavior is more noticeable to the "public" than the former is, in my view, down right fanciful.

Finally, the added administrative burden on Congress and the courts that Judge Williams' interpretation of the statute implies is staggering. How would the courts and Congress—as to whom the honorarium ban as written continues to apply—determine when speeches or a split article constitute a "series"?

The panel's decision is actually anchored to the strength of Judge Williams' subsequently expressed hypothetical appraisal of a congressional purpose in distinguishing between a series of speeches and single appearances. I find his explanation wholly unconvincing. But it certainly cannot be thought so powerful as to preclude the acceptability of my alternative construction. See *Blodgett v. Holden*, *supra*. Both a logical reading of the statute, as well as an examination of the legis-

lative history, suggest that section 505(3) can be construed as *not* banning the receipt of honoraria by governmental employees for speeches and writings unrelated to those employees' official duties or status. As so construed, the act clearly survives constitutional scrutiny. Judge Williams agrees that a statute that would ban governmental employees from profiting by speaking and writing on subjects directly related to their official duties, or where payment is related to the status of such officials, *would* be constitutional. See slip op. at 7. Under these circumstances, I should think that we would at least ask the parties to brief this issue before holding the Act unconstitutional.⁷

C.

Assuming, *arguendo*, that the statute should be read as

⁷ Given that the statute as amended might be viewed as ambiguous, it might also be thought that *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), commands deference to the agency entrusted with the act's administration (Office of Government Ethics), and that OGE's regulations, which enforce the literal reading of the statute, regulations, which enforce the literal reading of the statute, control the day. (The panel opinion itself does not rely on the Office of Government Ethics' interpretation of the act.) It is settled, however, that *Chevron* deference is not due to a regulation which interprets an act of Congress in a manner that raises serious constitutional difficulties. See *Edward J. De Bartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-001 (1979). That principle survives *Rust v. Sullivan*. See 111 S.Ct. 1759, 1771 (1991) (affirming that principle but finding that the regulations there at issue did not raise sufficiently serious constitutional difficulty). In this case there can be no doubt that the regulations, implementing the literalistic reading of the statute, raise serious constitutional difficulties. Under these circumstances, I would not defer to the agency's views, and would instead construe the statute to enforce its logical meaning.

literally punctuated, I would agree with my colleagues that the statute is unconstitutional. I am tentatively of this view because, unlike the panel, I see the statute, *not* as *overly* broad, but as not broad enough; that is, by failing flatly to ban honoraria given in exchange for a series of speeches and addresses, Congress has undermined any asserted interest in a prophylactic flat ban on paid speeches. The court should rehear the case, whether or not it is thought that the constitutional issue might be avoided, because the panel's constitutional analysis misapplies Supreme Court precedent.

The framework for evaluating the constitutionality of regulations on governmental employee speech was set out for the first time by the Supreme Court in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). Recognizing that "the State has interests as an employer in regulating the speech of its employees that differ *significantly* from those it possesses in connection with regulation of the speech of the citizenry in general," 391 U.S. at 568 (emphasis added), the Court articulated a fairly relaxed standard of review to govern such cases. Under the *Pickering* test, a court, in reviewing a restriction on governmental employee speech, must "balance . . . the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. Significantly, the governmental interest involved need not be compelling, or even substantial. Nor, as the Court has subsequently made clear, must the government demonstrate that its interest substantially outweighs the burden on speech created by the regulation in question. See *Connick v. Myers*, 461 U.S. 138, 150 (1983) (specifically rejecting the lower court's conclusion that the government had a "burden to 'clearly demonstrate' that the speech involved 'substantially interfered' with official responsibilities"). Under *Pickering* and its progeny, all

that is required is that the governmental interest involved outweigh—by some amount—the burden on speech imposed by its regulation.

In light of these precedents, had Congress actually enacted a flat ban on the receipt of honoraria by government employees, my tentative view, like Judge Sentelle in dissent, *see* slip op. at 24-29 (Sentelle, J., dissenting), is that such a ban would be constitutional. The panel terms the governmental interest in preventing corruption and the appearance of impropriety by government servants “strong,” slip op. at 7, but we have elsewhere suggested that “prevent[ing] the erosion of . . . public confidence in the integrity of [government employees]” amounts to a “compelling” governmental interest. *Keeffe v. Library of Congress*, 777 F.2d 1573, 1581 (D.C. Cir. 1985). That is not all. Under the subject or status test, which the statute applies to a “series” of speeches—and the panel would apply as a matter of constitutional law to all speeches—it could be devilishly difficult to fashion implementing regulations and even more difficult to apply them in thousands of cases.⁸ This administrative burden, in conjunction with the underlying goal sought to be attained, would seem to me sufficient to justify the imposition of a prophylactic ban on the receipt of honoraria by governmental employees. As the Supreme court unanimously cautioned in the course of reversing this court before, we should “[not] second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.” *FEC v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982).

⁸ For example, as an ex-ambassador to Yugoslavia, I have been asked to speak on events in that former country. If I did so for an honorarium, would it have anything to do with my present status as a judge? Would it depend on whether lawyers were part of the group that invited me, or whether they were in the audience?

Yet, having accepted precisely this burden for the entire government with regard to the delivery of a “series” of speeches, it seems to me that Congress itself has vitiated any asserted interest in a prophylactic ban on the receipt of honoraria for one-time speeches. This is not to suggest, however, that the statute in question fails constitutional scrutiny on the grounds that it is “underinclusive.” Congress can seek to address the problem of corruption in a piece-meal fashion if it so chooses. It is to recognize, however, that the *extent* to which Congress has chosen to ban an activity will be relevant in assessing Congress’ real interest in so doing.

Similarly, I regard overbreadth as a problem in the *Pickering* context only insofar as it affects the *Pickering* balance of the burden on speech created by the government action in question with the government interest sought to be furthered. Although a prior decision in this circuit held that a restriction on speech of government employees must be “narrowly drawn” to “restrict speech no more than is necessary” to further the relevant governmental interest, *see McGehee v. Casey*, 718 F.2d 1137, 1143 (D.C. Cir. 1983), the Supreme Court itself has never held the absence of so-called “narrow tailoring” to constitute an independent ground for invalidating a regulation of government employee speech. The breadth, as well as the weight, of the governmental restriction is of course *relevant* to the *Pickering* analysis. When the government burdens substantially more speech than “required” by its asserted interest, then its asserted interest might not outweigh that greater burden. After all, the greater the burden on speech, *ceteris paribus*, the more the *Pickering* balance will point toward invalidation of the rule. The flat in the *McGehee* narrow tailoring analysis is that the concept of narrow tailoring grows out of the constitutional skepticism with which the Court regards government regulation of private speech. The government must do no more than what the Court or courts regard as “necessary”. That is

simply not the appropriate attitude with which we review government attempts to control the speech of employees.

Although the panel opinion seems to rely heavily on the concept of narrow tailoring, Judge Williams, in his concurrence, describes it as only a “metaphor” for a balancing test not significantly different than *Pickering*’s. Some metaphor! As I understand the panel opinion, the entire ban on honoraria is unconstitutional so long as the court believes even one employee who should be permitted to speak for pay is not permitted. Consistent with this approach, the panel did not even carefully inquire into the situation of the very plaintiffs before it.⁹ Although Judge Williams disavows *McGehee v. Casey*, *supra*, as implicitly disapproved by the Supreme Court in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the panel seems to have followed it—in spades. The real difficulty with the panel’s analysis, in my view, is that it totally disregards any potential administrative burdens on the government—Judge Williams describes these as “line-drawing problems,” as if they were insignificant. See Opinion Concurring in the Denial of Rehearing *En Banc*, *supra*, at [6]. Yet, these administrative burdens are part of the government’s legitimate interest which must be weighed in determining whether a prophylactic ban that may sweep broader than the court would wish is constitutionally permissible.

Thus, a proper analysis of the government’s interest as an employer in the efficient running of the workplace—a need recognized in *Pickering* and its progeny as the basis for the relaxed review proper to such circumstances—must include its interest in minimizing enforcement and administrative costs. Even where a governmental regulation of employee speech extends to more situations than arguably “necessary” to further the government’s primary interest, that regulation might

⁹ See *supra* n.3.

still survive *Pickering* inquiry, especially when the burden of crafting—and then enforcing—a more limited ban is added to the “government interest” side of the *Pickering* balance. Precisely because “the State has interests as an employer in regulating the speech of its employees that differ *significantly* from those it possesses in connection with regulation of the speech of the citizenry in general,” *Pickering*, 391 U.S. at 568 (emphasis added), the government is not required to shoulder the same degree of enforcement costs when regulating its workplace that it must when private speech is involved.

D.

Finally, as Judge Sentelle pointed out in dissent, the panel’s choice of remedy is extremely troubling. All that is needed to cure the constitutional infirmity is to relieve the ban on compensation from single speeches whose subject does not relate to the employee’s job and when the status of the employee is not implicated. That takes only a minor modification of the definition of honorarium—indeed, one I believe Congress affirmatively intended. See *supra* at 10-11. Instead, the panel strikes down the entire statute, as it applies to the executive branch, including even, inexplicably, the obviously constitutional ban on executive branch employees giving a series of speeches directly drawn from their own work or where their status is obviously implicated.¹⁰

Judge Williams’ concurrence leaves me even more perplexed than before. He agrees that my construction of the statute (or my remedial approach), which applies a “status or subject matter” limitation to the honorarium ban, “transform[s] the statute into one of virtually undoubted constitutionality.”

¹⁰ The panel takes solace from executive branch *regulations* that might prohibit such—but Congress did not, and it is our task to apply legislation as much as possible.

See Opinion Concurring in the Denial of Rehearing *En Banc*, *supra*, at [1]. The amended act's ban on a series of appearances, which Judge Williams agrees includes precisely such a limitation, *must*, then, be constitutional. It seems to me, then, that the panel, by striking down even that ban, employed as its governing metaphor—rather than “narrow tailoring”—tossing out the constitutional baby with the arguably unconstitutional bath water.

The panel justifies its refashioning of the legislation to treat executive branch employees more favorably than employees of the other two branches by asserting that Congress would have wished to totally ban honoraria for legislative and judicial officers and employees because the subject matter before those two branches is so broad. But Congress explicitly concluded otherwise—at least with respect to a series of speeches. No distinction was drawn between the three branches, and although it may well be that a congressman's status is typically implicated when he or she gives a speech for money, it might not be true of judges. And there is certainly no reason to distinguish a mail room employee in the Treasury Department from a mail room employee in a federal court. The panel's remedy permits the former to lecture for money on, let us say, the Quaker religion, but assumes Congress would have wished to prohibit the latter from doing so—and, paradoxically, implies that it would be constitutional for Congress to ban all such speeches for judicial branch employees. *See slip op.* at 14.

When a court severs the constitutional portion of a statute—particularly in a statute lacking a severance clause—it should be careful to condemn only the parts it holds unconstitutional, and it should seek to adhere, as much as possible, to congressional intent. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); *Champlin Ref. Co. v. Corporation Comm'n of Oklahoma*, 286 U.S. 210, 234 (1932). Neither the panel opin-

ion nor Judge Williams' concurrence explains why simply holding that a ban on single speeches and articles more extensive than that which applies to a series of speeches or articles is unconstitutional would not have been a less intrusive, “narrowly tailored,” manner of exercising any constitutional infirmity. Here, Judge Williams' hypothetical rendition of congressional reasons for distinguishing between single speeches and a series, even if it were persuasive, just will not do. On the contrary, Judge Williams' view that Congress intended to draw a distinction between a “series” of speeches and a “single” speech, and that such a distinction is logical, makes the panel's result—which subjects both bans to the *same* remedy—particularly anomalous. As I noted above, when a court severs a portion of a statute it should seek to adhere to congressional intent. Judge Williams' view that Congress had good reason to treat a series differently from a “single” speech, along with the fact that Congress' ban as to a series is beyond doubt constitutional, should have led the panel (or the *en banc* court) to sustain at least that portion of the ban. In any event, the parties should be heard on this crucial question.

* * * * *

It may well be that neither the plaintiffs nor the government for their own respective tactical or political reasons had any incentive to focus this court's attention on the parenthetical clause that I believe should have guided the panel's opinion—or at least its remedy. But given the grave constitutional issues at stake, I think we should oblige the parties to explore the vast middle ground between their artificially extreme positions. My colleague objects to rushing into an *en banc* for this purpose, but I would have thought hastening to declare an act of Congress unconstitutional was the greater judicial imprudence. I would actually prefer that the panel initially explore the issues aired in my and Judge Williams' opinions, but I would rather have an *en banc* rehearing to none at all.

APPENDIX E

TITLE V—GOVERNMENT-WIDE LIMITATIONS ON OUTSIDE
EARNED INCOME AND EMPLOYMENT

§ 501. Outside earned income limitation

(a) OUTSIDE EARNED INCOME LIMITATION.—

(1) Except as provided by paragraph (2), a Member or an officer or employee who is a noncareer officer or employee and who occupies a position classified above GS-15 of the General Schedule or, in the case of positions not under the General Schedule, for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule may not in any calendar year have outside earned income attributable to such calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under section 5313 of title 5, United States Code, as of January 1 of such calendar year.

(2) In the case of any individual who during a calendar year becomes a Member or an officer or employee who is a noncareer officer or employee and who occupies a position classified above GS-15 of the General Schedule or, in the case of positions not under the General Schedule, for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule such individual may not have outside earned income attributable to the portion of that calendar which occurs after such individual becomes a Member or such an officer or employee which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under section 5313 of title 5, United States Code, as of January

1 of such calendar year multiplied by a fraction the numerator of which is the number of days such individual is a Member or such officer or employee during such calendar year and the denominator of which is 365.

(b) HONORARIA PROHIBITION.—An individual may not receive any honorarium while that individual is a Member, officer or employee.

(c) TREATMENT OF CHARITABLE CONTRIBUTIONS.—Any honorarium which, except for subsection (b), might be paid to a Member, officer or employee, but which is paid instead on behalf of such Member, officer or employee to a charitable organization, shall be deemed not to be received by such Member, officer or employee. No such payment shall exceed \$2,000 or be made to a charitable organization from which such individual or a parent, sibling, spouse, child, or dependent relative of such individual derives any financial benefit.

(Pub. L. 95-521, title V, § 501, as added Pub. L. 101-194, title VI, § 601(a), Nov. 30, 1989, 103 Stat. 1760, amended Pub. L. 101-280, § 7(a), May 4, 1990, 104 Stat. 161; Pub. L. 102-378, § 4(b)(1), (2), Oct. 2, 1992, 106 Stat. 1357.)

§ 502. Limitations on outside employment

(a) LIMITATIONS.—A Member or an officer or employee who is a noncareer officer or employee and who occupies a position classified GS-15 of the General Schedule or, in the case of positions not under the General Schedule, for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS-15 of the General Schedule shall not—

(1) receive compensation for affiliating with or being employed by a firm, partnership, association, corporation, or other entity which provides professional services involving a fiduciary relationship;

(2) permit that Member's, officer's, or employee's name to be used by any such firm, partnership, association, corporation, or other entity;

(3) receive compensation for practicing a profession which involves a fiduciary relationship;

(4) serve for compensation as an officer or member of the board of any association, corporation, or other entity; or

(5) receive compensation for teaching, without the prior notification and approval of the appropriate entity referred to in section 503.

(b) **TEACHING COMPENSATION OF JUSTICES AND JUDGES RETIRED FROM REGULAR ACTIVE SERVICE.**—For purposes of the limitation under section 501(a), any compensation for teaching approved under subsection (a)(5) of this section shall not be treated as outside earned income—

(1) when received by a justice of the United States retired from regular active service under section 371(b) of title 28, United States Code;

(2) when received by a judge of the United States retired from regular active service under section 371(b) of title 28, United States Code, for teaching performed during any calendar year for which such judge has met the requirements of subsection (f) of section 371 of title 28, United States Code, as certified in accordance with such subsection; or

(3) when received by a justice or judge of the United States retired from regular active service under section 372(a) of title 28, United States Code.

(Pub. L. 95-521, title V, § 502, as added Pub. L. 101-194, title VI, § 601(a), Nov. 30, 1989, 103 Stat. 1761, amended Pub. L. 101-280, § 7(a)(1), (b), May 4, 1990, 104 Stat. 161; Pub. L. 101-650, title III, § 319, Dec. 1, 1990, 104 Stat. 5117; Pub. L.

102-198, § 6, Dec. 9, 1991, 105 Stat. 1624; Pub. L. 102-378, § 4(b)(3), Oct. 2, 1992, 106 Stat. 1357.)

§ 503. Administration

This title shall be subject to the rules and regulations of—

(1) and administered by—

(A) the Committee on Standards of Official Conduct of the House of Representatives, with respect to Members, officers, and employees of the House of Representatives; and

(B) in the case of Senators and legislative branch officers and employees other than those officers and employees specified in subparagraph (A), the committee to which reports filed by such officers and employees under title I are transmitted under such title, except that the authority of this section may be delegated by such committee with respect to such officers and employees;

(2) the Office of Government Ethics and administered by designated agency ethics officials with respect to officers and employees of the executive branch; and

(3) and administered by the Judicial Conference of the United States (or such other agency as it may designate) with respect to officers and employees of the judicial branch.

(Pub. L. 95-521, title V, § 503, as added Pub. L. 101-194, title VI, § 601(a), Nov. 30, 1989, 103 Stat. 1761, amended Pub. L. 101-280, § 7(c), May 4, 1990, 104 Stat. 161; Pub. L. 102-90, title I, § 6(b)(1), Aug. 14, 1991, 105 Stat. 450.)

§ 504. Civil Penalties

(a) **CIVIL ACTION.**—The Attorney General may bring a civil action in any appropriate United States district court

against any individual who violates any provision of section 501 or 502. The court in which such action is brought may assess against such individual a civil penalty of not more than \$10,000 or the amount of compensation, if any, which the individual received for the prohibited conduct, whichever is greater.

(b) **ADVISORY OPINIONS.**—Any entity described in section 503 may render advisory opinions interpreting this title, in writing, to individuals covered by this title. Any individual to whom such an advisory opinion is rendered and any other individual covered by this title who is involved in a fact situation which is indistinguishable in all material aspects, and who, after the issuance of such advisory opinion, acts in good faith in accordance with its provisions and findings shall not, as a result of such actions, be subject to any sanction under subsection (a).

(Pub. L. 95-521, title V, § 504, as added Pub. L. 101-194, title VI, § 601(a), Nov. 30, 1989, 103 Stat. 1761.)

§ 505. Definitions

For purposes of this title:

(1) The term “Member” means a Senator in, a Representative in, or a Delegate or Resident Commissioner to, the Congress.

(2) The term “officer or employee” means any officer or employee of the Government except any special Government employee (as defined in section 202 of title 18, United States Code).

(3) The term “honorarium” means a payment of money or any thing of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual’s official duties or the payment is made be-

cause of the individual’s status with the Government) by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative) to the extent that such expenses are paid or reimbursed by any other person, and the amount otherwise determined shall be reduced by the amount of any such expenses to the extent that such expenses are not paid or reimbursed.

(4) The term “travel expenses” means, with respect to a Member, officer or employee, or a relative of any such individual, the cost of transportation, and the cost of lodging and meals while away from his or her residence or principal place of employment.

(5) The term “charitable organization” means an organization described in section 170(c) of the Internal Revenue Code of 1986 [26 U.S.C. 170(c)].

(Pub. L. 95-521, title V, § 505, as added Pub. L. 101-194, title VI, § 601(a), Nov. 30, 1989, 103 Stat. 1761, amended Pub. L. 102-90, title I, § 6(b)(2), (3), title III, § 314(b), Aug. 14, 1991, 105 Stat. 450, 469.)

PART 2636—LIMITATIONS ON OUTSIDE EMPLOYMENT AND PROHIBITION OF HONORARIA; CONFIDENTIAL REPORTING OF PAYMENTS TO CHARITIES IN LIEU OF HONORARIA

Subpart A—General Provisions

Sec.

- 2636.101 Purpose.
- 2636.102 Definitions.
- 2636.103 Advisory opinions.
- 2636.104 Civil, disciplinary and other action.

Subpart B—The Honorarium Prohibition; Confidential Reporting of Payments to Charities in Lieu of Honoraria

- 2636.201 General Standard.
- 2636.202 Relationship to other laws and regulations.
- 2636.203 Definitions.
- 2636.204 Payments to charitable organizations in lieu of honoraria.
- 2636.205 Reporting payments to charitable organizations in lieu of honoraria.

AUTHORITY: 5 U.S.C. App. (Ethics in Government Act of 1978, sections 102(a)(1)(A), 402, 404 and 501-505); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

SOURCE: 56 FR 1723, Jan. 17, 1991, unless otherwise noted.

Subpart A—General Provisions

§ 2636.101 Purpose.

This part is issued under authority contained in titles II and VI of the Ethics Reform Act of 1989 (Pub. L. 101-194, as amended), amending the Ethics in Government Act of 1978, and contains regulations that implement the following:

(a) The prohibition at 5 U.S.C. app. 501(b) against receipt of honoraria and the provisions of 5 U.S.C. app. 501(c) whereby payments may be made to charitable organizations in lieu of honoraria;

(b) The confidential reporting requirement at 5 U.S.C. app. 102(a)(1)(A) applicable to payments made to charitable organizations in lieu of honoraria; and

(c) The 15 percent outside earned income limitation at 5 U.S.C. app. 501(a) and the limitations at 5 U.S.C. app. 502 on outside employment and affiliation applicable to certain non-career employees.

§ 2636.102 Definitions.

The definitions listed below are of general applicability to this part. Additional definitions of narrower applicability appear in the subparts or sections of subparts to which they apply. For purposes of this part:

(a) *Agency ethics official* refers to the designated agency ethics official and to any deputy ethics official described in § 2638.204 of this subchapter to whom authority to issue advisory opinions under § 2636.103 of this part or to receive and review reports of honoraria recipients under § 2636.204 of this part has been delegated by the designated agency ethics official.

(b) *Designated agency ethics official* refers to the official described in § 2638.201 of this subchapter.

(c) *Employee* means any officer or employee of the executive branch, other than a special Government employee as defined in 18 U.S.C. 202. It includes officers but not enlisted members of the uniformed services as defined in 5 U.S.C. 2101(3). It does not include the President or Vice President.

(d) *Executive branch* includes each executive agency as defined in 5 U.S.C. 105 and any other entity or administrative

unit in the executive branch. However, it does not include any agency that is defined by 5 U.S.C. app. 109(11) as within the legislative branch.

(e) The terms *he*, *his*, and *him* include "she," "hers" and "her."

§ 2636.103 Advisory opinions.

(a) *Request for an advisory opinion.* (1) An employee may request an advisory opinion from an agency ethics official as to whether specific conduct which has not yet occurred would violate any provision contained in this part.

(2) An advisory opinion may not be obtained for the purpose of establishing:

(i) Whether a particular entity qualifies as a charitable organization to which an honorarium may be paid pursuant to § 2636.204 of this part; or

(ii) Whether a noncareer employee who is subject to the restrictions in subpart C of this part may receive compensation for teaching. An advisory opinion issued under this section may not be substituted for the advance written approval required by § 2636.307 of this part.

(3) The employee's request for an advisory opinion shall be submitted in writing, shall be dated and signed, and shall include all information reasonably available to the employee that is relevant to the inquiry. Where, in the opinion of the agency ethics official, complete information has not been provided, that official may request the employee to furnish additional information necessary to issue an opinion.

(b) *Issuance of advisory opinion.* As soon as practicable after receipt of all necessary information, the agency ethics official shall issue a written opinion as to whether the conduct in issue would violate any provision contained in this part. Where conduct which would not violate this part would vio-

late another statute relating to conflicts of interest or applicable standards of conduct, the advisory opinion shall so state and shall caution the employee against engaging in the conduct.

(1) For the purpose of issuing an advisory opinion, the agency ethics official may request additional information from agency sources, including the requesting employee's supervisor, and may rely upon the accuracy of information furnished by the requester or any agency source unless he has reason to believe that the information is fraudulent, misleading or otherwise incorrect.

(2) A copy of the request and advisory opinion shall be retained for a period of 6 years.

(c) *Good faith reliance on an advisory opinion.* An employee who engages in conduct in good faith reliance upon an advisory opinion issued to him under this section shall not be subject to civil or disciplinary action for having violated this part. Where an employee engages in conduct in good faith reliance upon an advisory opinion issued by an ethics official of his agency to another, neither the Office of Government Ethics nor the employing agency shall initiate civil or disciplinary action under this part for conduct that is indistinguishable in all material aspects from the conduct described in the advisory opinion. However, an advisory opinion issued under this section shall not insulate the employee from other civil or disciplinary action if his conduct violates any other laws, rule, regulation or lawful management policy or directive. Where an employee has actual knowledge or reason to believe that the opinion is based on fraudulent, misleading, or otherwise incorrect information, the employee's reliance on the opinion will not be deemed to be in good faith.

(d) *Revision of an ethics opinion.* Nothing in this section prohibits an agency ethics official from revising an ethics opinion on a prospective basis where he determines that the

ethics opinion previously issued is incorrect, either as a matter of law or because it is based on erroneous information.

§ 2636.104 Civil, disciplinary and other action.

(a) *Civil action.* Except when the employee engages in conduct in good faith reliance upon an advisory opinion issued under § 2636.103 of this subpart, an employee who accepts an honorarium or engages in any other conduct in violation of the prohibitions, limitations and restrictions contained in this part may be subject to civil action under 5 U.S.C. app. 504(a) and a civil penalty of not more than \$10,000 or the amount of compensation the individual received for the prohibited conduct, whichever is greater. Knowing and willful failure to file the report required by § 2636.205 of this part or falsification of information thereon may subject an employee to a civil penalty of not more than \$10,000 under 5 U.S.C. app. 104(a).

(b) *Disciplinary and corrective action.* An agency may initiate disciplinary or corrective action against an employee who violates any provision of this part, which may be in addition to any civil penalty prescribed by law. When an employee engages in conduct in good faith reliance upon an advisory opinion issued under § 2636.103 of this subpart, an agency may not initiate disciplinary or corrective action for violation of this part. Disciplinary action includes reprimand, suspension, demotion and removal. Corrective action includes any action necessary to remedy a past violation of this part, including but not limited to restitution or termination of an activity. It is the responsibility of the employing agency to initiate disciplinary or corrective action in appropriate cases. However, the Director of the Office of Government Ethics may order corrective action or recommend disciplinary action under the procedures at part 2638 of this subchapter. The imposition of disciplinary action is at the discretion of the employing agency.

(c) *Late Filing Fee.* An employee may be assessed a late filing fee of \$200 under 5 U.S.C. app. 104(d) for any report of payments to charitable organizations in lieu of honoraria required by § 2636.205 of this part that is filed more than 30 days after the date the report is due.

(d) *Criminal penalties.* An employee who knowingly and willfully falsifies information on a report of payments to charitable organizations in lieu of honoraria required by § 2636.205 of this part may be subject to criminal prosecution and sentencing under 18 U.S.C. 1001 and 3571.

Subpart B—The Honorarium Prohibition; Confidential Reporting of Payments to Charities in Lieu of Honoraria

§ 2636.201 General standard.

An individual may not receive any honorarium while that individual is an employee.

§ 2636.202 Relationship to other laws and regulations.

The honorarium prohibition described in this subpart is in addition to any restriction on appearances, speaking or writing or the receipt of compensation therefor to which an employee is subject under applicable standards of conduct or by reason of any statute or regulation relating to conflicts of interests. Even though compensation for an activity is not prohibited by this subpart, an employee should accept compensation, including travel expenses, or engage in the activity for which compensation is offered, only after determining that it is not prohibited by the following:

(a) An employee is prohibited by criminal statute and by the standards of conduct at part 735 of this title and agency implementing regulations from accepting compensation for an appearance or speech made or an article written in his official capacity or as part of his official duties. Unless specifically

authorized by a statute, such as 5 U.S.C. 4111, 5 U.S.C. 7342, or 31 U.S.C. 1353, this prohibition applies to the acceptance of travel expenses paid other than by the United States Government.

(b) An employee is prohibited by the standards of conduct from receiving compensation, including travel expenses, for speaking or writing on subject matter that focuses specifically on his official duties or on the responsibilities, policies and programs of his employing agency.

(c) As described in subpart C of this part, certain noncareer employees are subject to limitations on their receipt of outside earned income and may not engage in compensated teaching activities without advance approval under § 2636.307 of that subpart.

§ 2636.203 Definitions.

For purposes of this subpart:

(a) *Honorarium* means a payment of money or anything of value for an appearance, speech or article. The term does not include:

(1) Items that may be accepted under applicable standards of conduct gift regulations if they were offered by a prohibited source;

(2) Meals or other incidents of attendance, such as waiver of attendance fees or course materials furnished as part of the event at which an appearance or speech is made;

(3) Copies of publication containing articles, reprints of articles, tapes of appearances or speeches, and similar items that provide a record of the appearance, speech or article;

(4) Actual and necessary travel expenses for the employee and one relative incurred in connection with an appearance or speech or the writing or publication of an article. Such travel expenses, when paid, reimbursed or provided in kind by an-

other, shall not be counted as part of an honorarium. Where such expenses are not paid or reimbursed, the amount of an honorarium shall be determined by subtracting the actual and necessary travel expenses incurred in connection with the appearance or speech or the writing or publication of the article;

(5) Actual expenses in the nature of typing, editing and reproduction costs incurred in connection with the making of an appearance or speech or the writing or publication of an article, when paid or reimbursed by another;

(6) Compensation for goods or services other than appearing, speaking or writing, even though making an appearance or speech or writing an article may be an incidental task associated with provisions of the goods or services;

(7) Salary, wages and other compensation pursuant to an employer's usual employee compensation plan when paid by the employer for services on a continuing basis that involve appearing, speaking or writing. For these purposes, the term "employment" refers to services rendered in the context of an employer-employee relationship. It does not include any arrangement entered into by the employee or another as an independent contractor or with an agent, speakers bureau or similar entity that facilitates appearances or speaking or writing opportunities;

(8) Compensation for teaching a course involving multiple presentations by the employee offered as part of a program of education or training sponsored and funded by the Federal government or by a state or local government;

(9) Compensation for teaching a course involving multiple presentations by the employee offered as part of the regularly established curriculum of an institution of higher education as defined at 20 U.S.C. 1141(a);

(10) An award for artistic, literary or oratorical achievement made on a competitive basis under established criteria;

(11) Witness fees credited under 5 U.S.C. 5515 against compensation payable by the United States; or

(12) Compensation received for any appearance or speech made or article accepted for publication prior to January 1, 1991, or for any appearance or speech made or article written in satisfaction of the employee's obligation under a contract entered into prior to January 1, 1991.

(13) Payment for a series of three or more different but related appearances, speeches or articles, provided that the subject matter is not directly related to the employee's official duties and that the payment is not made because of the employee's status with the Government.

Example 1. An employee of the Department of Agriculture has entered into a contract to develop a complex software package for a private company. The contract, which is for a single fee for all work to be provided under the contract, requires the employee to provide 2 hours of oral instruction on use of the program. He may accept the entire fee for performance under the contract. No part of the fee is an honorarium since the 2 hours of instruction is only incidental to his development and delivery of the software package. He could not, however, receive a fee specifically for 2 hours of oral instruction on the use of a program he had earlier provided under a contract that required only his development of a program.

Example 2. A management trainee employed by the Bureau of Indian Affairs is employed two nights a week as a reporter on a local newspaper. He may receive a salary for his continuing employment even though it is in a profession characterized by the writing of articles. He may not, however, accept compensation for newspaper or magazine articles written on a freelance basis or pursuant to a contract to furnish 5 articles over a one year period.

Example 3. An economist employed by the Department of the Treasury has entered into an agreement with a speakers

bureau to give 10 unrelated after-dinner speeches to be arranged by the speakers bureau with various organizations over a six-month period. The employee may not receive the contract fee of \$10,000. The 10 speeches do not constitute a series of speeches, but 10 individual speeches.

Example 4. An attorney employed by the Department of the Air Force may not accept compensation for teaching a two-day seminar on Federal procurement law presented by a publishing company under the sponsorship of an accredited law school. He may, however, accept compensation for teaching procurement law as part of the law school's regular curriculum of courses.

Example 5. An air traffic controller employed by the Federal Aviation Administration has entered into a contract with a magazine publisher to write an article on sheep ranching in New Zealand. In addition to a fee of \$500 for the article, the contract provides that the publisher will provide expenses for the employee to travel to New Zealand to conduct research on sheep ranching. The employee may accept the travel expenses, but not the \$500 fee. In lieu of the \$500 fee, he could not accept expenses to travel to and stay for a weekend in Sydney, Australia after the completion of his research.

Example 6. An employee of the National Aeronautics and Space Administration may accept compensation for a series of three articles on white collar crime she has agreed to write for a local newspaper. While she could not accept compensation for just two articles on white collar crime, she could accept a national journalism award for two articles she had written on an uncompensated basis.

Example 7. A physicist employed by the Department of Energy to conduct research on laser technology may not accept a contract fee for a series of three lectures on lasers where one of the lectures is to focus on the research he is conducting for DOE.

(b) *Appearance* means attendance at a public or private conference, convention, meeting, hearing, event or other gathering and the incidental conversation or remarks made at that time. Unless the opportunity was extended to the employee wholly or in part because of his official position, the term does not include performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display.

Example 1. Because the fee is for an "appearance", an employee of the Securities and Exchange Commission who was responsible for a major securities fraud investigation may not accept a fee for standing in the reception line at the premier of a movie entitled "Junk Bond Scandal."

Example 2. A staff member of the National Security Council does not make an "appearance" by playing the piano and singing at a wedding reception and may accept a fee for his performance.

Example 3. An employee of the Forest Service does not make an "appearance" by modeling in a fashion show and may accept a modeling fee.

(c) *Speech* means an address, oration, or other form of oral presentation, whether made in person, recorded or broadcast. Unless the opportunity was extended to the employee wholly or in part because of his official position, the term does not include the recitation of scripted material, as for a live or recorded theatrical production, or any oral presentation that is an incident of any performance that is excluded from the definition of an *appearance* in paragraph (b) of this section. It does not include the conduct of worship services or religious ceremonies.

Example 1. An attorney employed by the Department of Justice may not receive a \$50 honorarium for her informal talk to a local gardening club on how to design and grow a Victorian rose garden. Her talk, though informal, is a "speech."

Example 2. A nutritionist employed by the National Institutes of Health who is a stand-up comedian by avocation may accept a fee for performing a comedy routine at a dinner theater. His oral remarks do not constitute a speech because they are an incident of his performance using his talent as a comedian. He could not, however, accept compensation for a speech simply because he tells an introductory joke or otherwise amuses his audience.

Example 3. A statistician employed by the Department of Labor who is a lay minister may accept a gratuitous payment of \$50 for performing a funeral service since it involves his conduct of a religious ceremony. However, he may not accept a payment for a talk on theology given to other ministers, for offering a prayer at the opening of a convention or for delivering a sermon during a worship service conducted by another minister. He could accept payment for his own conduct of worship services.

Example 4. A price analyst employed by the Defense Fuel Supply Agency may accept a fee of \$100 for writing a speech to be delivered by another. The term "speech" includes only oral presentations and does not include writing a speech to be delivered by someone other than the employee. Moreover, the text of a speech is not an article.

Example 5. The stage portrayal of Hamlet by an employee of the Department of State does not involve the making of a "speech." He may be paid for his role in the Shakespearean production.

(d) *Article* means a writing, other than a book or a chapter of a book, which has been or is intended to be published or republished in a journal, newspaper, magazine or similar collection of writings. The term does not include works of fiction, poetry, lyrics, or script.

Example 1. An employee of the Office of Personnel Management who has reviewed a new book about the New York

Yankees may not accept a \$50 honorarium from the publisher of a sports magazine. The book review is an "article."

Example 2. The lyrics and music for a college song written by two Department of the Navy attorneys does not constitute an "article." The attorneys could each accept a gratuitous payment of \$50 if the song were selected by their alma mater for publication in its compendium of college songs.

Example 3. An engineer employed by the National Aeronautics and Space Administration has entered into a contract with an association of electrical component manufacturers to proofread and edit articles submitted by members of the association for publication in its monthly newsletter. The employee may accept the contract fee since the compensation is not for the writing of articles.

Example 4. An accountant employed by the Federal Deposit Insurance Corporation may accept compensation for writing a chapter of a textbook on corporate accounting. A chapter of a book is not an "article."

(e) *Receive* means that there is actual or constructive receipt of the honorarium by the employee so that the employee has a right to exercise dominion and control over the honorarium and direct its subsequent use. For purposes of this subpart, an honorarium is received while an employee if it is for an appearance or speech made or any article submitted for publication by that individual while he was an employee. Except when it is paid to a charitable organization in accordance with § 2636.204 of this subpart, an honorarium is received by an employee:

(1) If it is paid to another person on the basis of designation, recommendation or other specification by the employee; or

(2) If, with the employee's knowledge and acquiescence, it is paid to his parent, sibling, spouse, child or dependent relative.

Example 1. At the suggestion of the Army officer who authored an article selected for publication in a popular magazine, the publisher paid the amount of its usual honorarium to the officer's husband. The officer has "received" an honorarium.

Example 2. An employee of the Department of Housing and Urban Development has been offered a \$500 honorarium for a speech to be given during the week before his scheduled date of retirement from Federal service. Since it is for a speech to be made while he is an employee, he will have "received" the offered honorarium while an employee even though actual payment may not occur until after his retirement.

(f) *Charitable organization* means an organization which is qualified with respect to deductible charitable contributions under 26 U.S.C. 170(c) because it is organized or operated exclusively for religious, charitable, scientific, literary, educational or another specified purpose. It includes, but is not limited to, an organization exempt from Federal taxation under the authority of 26 U.S.C. 501(c)(3).

(g) *Travel expenses* means the actual and necessary cost of transportation, lodging and meals incurred while away from the employee's residence or principal place of employment in connection with an appearance, speech or article. Where the lodgings and meals portion of travel expenses are paid or reimbursed by another in the form of a per diem or subsistence expense allowance, that allowance shall be treated as actual and necessary travel expenses if the allowance is no more than that customarily paid by the payor to its own officers or employees, provided the employee in fact incurs costs for commercial meals and lodgings on each day for which the allowance is received.

[56 FR 1723, Jan. 17, 1991, as amended at 57 FR 602, Jan. 8, 1992]

§ 2636.204 Payment to charitable organizations in lieu of honoraria.

(a) *Effect of payment to a charitable organization.* An honorarium which, but for this subpart, could be paid to an employee but is paid instead on behalf of the employee to a charitable organization is deemed not to be received by the employee. An employee may suggest that an honorarium that he is prohibited from receiving solely by application of this subpart be paid in his name to a charitable organization. An honorarium received and later donated to a charitable organization by the employee does not qualify as a payment to a charitable organization in lieu of an honorarium made in accordance with this section.

NOTE: An employee on whose behalf a payment in lieu of an honorarium has been made to a charitable organization may not take a tax deduction on account of the payment under any provision of the Internal Revenue Code or under any tax law of a State or political subdivision thereof.

(b) *Nonqualifying payments to charitable organizations.* No payment may be made to a charitable organization pursuant to this section:

(1) If the employee would be prohibited from receiving and retaining the honorarium by any conflict of interest statute or regulation or applicable standards of conduct other than this subpart. Honoraria that the employee is prohibited from receiving and retaining would include, for example, any honorarium that is for:

(i) An appearance or speech made or article written by the employee in an official capacity or as part of his official duties; or

(ii) A speech or article, the subject matter of which focuses specifically on agency responsibilities, policies or programs.

(2) In an amount in excess of \$2,000 per appearance, speech, or article; or

(3) If the employee, the employee's parent, sibling, spouse, child, or dependent relative derives any direct financial benefit from the charitable organization that is separate from and beyond any general benefit conferred by the organization's activities.

Example 1. An Assistant U.S. Attorney who has successfully prosecuted an espionage case may not suggest that an honorarium offered for his speech about the prosecution be given to his law school. Because the topic of the speech relates to his official duties, he is prohibited from accepting any compensation by applicable standards of conduct. He could, however, suggest that an honorarium offered for his speech on training sheepdogs, be paid to his school.

Example 2. A personnel specialist employed by the Department of Labor whose spouse is employed by the Red Cross may not suggest that an honorarium for his speech about his vacation spent bicycling through China be donated in his name to the Red Cross.

Example 3. A claims examiner employed by the Department of Veterans Affairs whose mother suffers from Parkinson's Disease may suggest that an honorarium for her article on historic preservation be donated to a charitable organization that funds research seeking a cure for Parkinson's Disease. She may not suggest, however, that it be donated to a charitable organization that provides her mother with in-home nursing services.

§ 2636.205 Reporting payments to charitable organizations in lieu of honoraria.

(a) *Who must file.* A current or former employee, other than a new entrant, who is required to file a financial disclosure report, either on a confidential or public basis, shall at the

same time file a confidential report of payments to charitable organizations in lieu of honoraria if:

(1) Payments in lieu of honoraria aggregating more than \$200 were made on his behalf by any one source to one or more charitable organizations during the reporting period covered by the financial disclosure statement; or

(2) In the case of an individual filing a termination report, there is an understanding between the reporting individual and any other person that payments in lieu of honoraria will be made on his behalf for an appearance or speech made or article submitted for publication while the individual was a Government employee which, together with any payments in lieu of honoraria made by that source during the reporting period, will aggregate more than \$200.

This reporting requirement is in addition to any other requirement to disclose on a public or confidential financial disclosure report the source, date and amount of an honorarium paid to a charitable organization on the employee's behalf. It does not apply to any payment in lieu of an honorarium made to a charitable organization on behalf of the current or former employee's spouse or dependent child.

(b) *Where and when to file.* The report required by this section shall be filed with the agency ethics official by the date the current or former employee is required to file a confidential or public financial disclosure report. Any grant of an extension to file a financial disclosure report shall automatically extend the date for filing the report of payments to charitable organizations in lieu of honoraria and the agency ethics official may, for good cause shown by the employee, grant a separate extension of the date for filing the report required by this section. The total of all extensions for filing the report required by this section shall not exceed 90 days.

(c) *Reporting period.* The report of payments to charitable organizations in lieu of honoraria shall cover the same

period that applies to the confidential or public financial disclosure report the individual is required to file. For employees filing annual financial disclosure reports, the reporting period is the preceding calendar year or, if the employee commenced Government service during that year, the portion of the preceding calendar year beginning with the date the employee entered on duty. For those filing termination reports, the reporting period is the portion of the calendar year in which he terminated Government service up to the date of termination and, if he has not yet filed an annual financial disclosure report covering that period, the preceding calendar year or other period required for the annual report.

(d) *What to report.* Each report shall be filed on the standard form prescribed by the Office of Government Ethics and made available through the General Services Administration. Each report filed shall include the following information for each payment to a charitable organization in lieu of an honorarium, regardless of amount, made on the employee's behalf by any source from whom such payments made during the reporting period aggregate more than \$200:

- (1) The date of the payment (if payment has been made);
- (2) The date of the appearance or speech for which the honorarium was paid or, where the honorarium is for an article, the date the article was submitted by the employee for publication;
- (3) The name of the person or entity making the payment to the charitable organization;
- (4) The name and the tax status of charitable purpose of the recipient;
- (5) The subject matter of the speech or article or, where the honorarium is for an appearance, the reason for the appearance; and
- (6) The amount of the payment;

An individual filing a termination report who is reporting with respect to payments which have not yet been made should write "Not Applicable" in the space provided for the date of payment and should provide the remainder of the information required on the basis of his best knowledge and belief as to payments which he understands will be made to charitable organizations on his behalf.

(e) *Effect of signing the form.* By signing the form the employee certifies that the information he has reported is true, complete and correct to the best of his knowledge and that neither he nor his parent, sibling, spouse, child or dependent relative receives from the recipient charitable organization a benefit that is separate and distinct from any general benefit conferred by the organization's activities.

(f) *Review of reports.* Within 60 days after receipt, the agency ethics official shall review each report of payments to charitable organizations in lieu of honoraria to determine that the reporting requirements of this section have been met and that each payment reported meets the standards at § 2636.204 of this subpart.

(1) The agency ethics official need not audit the report to ascertain whether the disclosures are correct; disclosures are to be taken at face value unless there is a patent omission or ambiguity or the official has independent knowledge of matters outside the report.

(2) If the agency ethics official determines that the report is complete and that each payment is proper, he shall sign and date the report.

(3) If the agency ethics official determines that the form is not complete, he shall request that the employee complete the form by a specific date and annotate each addition or change with the employee's signature and the date the annotation was made. The 60 day period for review shall run from the date the completed form is filed.

(4) If the agency ethics official determines that additional information is needed to determine whether a payment to a charitable organization meets the standards at § 2636.204 of this subpart, he shall request that the employee furnish such information by a specific date and shall date and append to the report any information obtained in writing or annotate the report to reflect any information obtained other than in writing and the date it was furnished. The 60 day period for review shall run from the date the additional information is furnished.

(5) If the agency ethics official determines that the employee has failed to file a report or a complete report or has received an honorarium in violation of § 2636.201 of this subpart because a reported payment does not meet the standards at § 2636.204 of this subpart, he shall give the individual written notice of the deficiency and 10 days in which to submit a written response and, thereafter, shall refer the case for appropriate action as described in § 2636.104 of this subpart and annotate the report to reflect that referral.

(g) *Filing of reports with the Office of Government Ethics.* On August 15 of each year, the designated agency ethics official shall forward to the Office of Government Ethics all reports reviewed within his agency during the preceding one-year period.

(h) *Review of reports by the Office of Government Ethics.* Within 60 days after receiving the reports forwarded under paragraph (g) of this section, reports of payments to charitable organizations in lieu of honoraria filed by individuals whose public financial disclosure reports are required to be filed with the Director of the Office of Government [sic] shall be reviewed and signed by the Director.

(i) *Retention of reports.* Reports of payments to charitable organizations in lieu of honoraria shall be retained by the Office of Government Ethics for a period of 6 years. Unless needed in an ongoing investigation, the reports shall be destroyed after 6 years.

(j) *Confidentiality of reports.* Reports of payments to charitable organization in lieu of honoraria filed pursuant to this section are not available to members of the public and are to be treated with the confidentiality afforded confidential financial disclosure reports.

[56 FR 1723, Jan. 17, 1991, as amended at 56 FR 21589, May 10, 1991; 56 FR 51319, Oct. 11, 1991]

EFFECTIVE DATE NOTE: At 57 FR 5369, Feb. 14, 1992, the effective date of § 2636.205 was further deferred until the form to actually collect the information required under that section is approved by OMB.

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OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, *et al.*,
v. *Petitioners*

NATIONAL TREASURY EMPLOYEES UNION, *et al.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**BRIEF FOR THE NATIONAL TREASURY EMPLOYEES
UNION, ET AL., IN OPPOSITION**

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QUESTIONS PRESENTED

The Ethics Reform Act of 1989, as amended, 5 U.S.C. App. 501, *et seq.* (Supp. IV 1992), prohibits the receipt of "any thing of value" for any appearance, speech or article by Members of Congress and by officers and employees of the federal government. The questions presented are:

1. Whether the court of appeals correctly applied the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968), in holding that a ban on receipt of compensation for expressive activities unrelated to official duties unconstitutionally restricts the First Amendment rights of executive branch employees because it is broader than reasonably necessary to serve a substantial governmental interest.

2. Whether the court of appeals correctly invalidated Section 501(b) as applied to executive branch employees, leaving it to Congress to narrow the ban, rather than attempting to render the statute constitutionally sound by fashioning a nexus standard of its own.

PARTIES TO THE PROCEEDING

National Treasury Employees Union Chapter 143 is a party to this proceeding, in addition to those listed by the United States.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1170

UNITED STATES OF AMERICA, *et al.*,
v. *Petitioners*

NATIONAL TREASURY EMPLOYEES UNION, *et al.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES
UNION, ET AL., IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-58a) is reported at 990 F.2d 1271. The opinions filed on the denial of rehearing en banc (Pet. App. 80a-107a) are reported at 3 F.3d 1555. The opinion of the district court (Pet. App. 59a-78a) is reported at 788 F. Supp. 4. The opinion of the court of appeals affirming the denial of a preliminary injunction is reported at 927 F.2d 1253.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1993. The petition for rehearing was denied on September 21, 1993. The petition for certiorari was timely filed on January 19, 1994, pursuant to an extension of time granted by the Chief Justice on December

10, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTION, STATUTE, AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law * * * abridging the freedom of speech." The relevant portion of the Ethics Reform Act of 1989, as amended, 5 U.S.C. app. 501 *et seq.* (Supp. IV 1992), is set forth at Pet. App. 108a-113a. The relevant regulations implementing that Act are set forth at Pet. App. 114a-134a. Other regulations establishing standards of conduct applicable to executive branch employees' outside activities, 5 C.F.R. 2635.801 *et seq.* (1993 ed.), are set forth in the appendix to this opposition, App. 1a-24a.

STATEMENT

1. For many years, members of the career civil service have been subject to an array of government-wide restrictions, often supplemented by individual agency restrictions, designed to prohibit participation in any outside activities that could create a conflict of interest or the appearance of a conflict. *See, e.g.,* 5 C.F.R. 735.201 *et seq.* (1990 ed.); C.A. Joint Appendix 130-135, 110-117. Among other things, they were prohibited from engaging in any activity "not compatible with the full and proper discharge" of their governmental duties, from accepting compensation that might create the appearance of a conflict, and from using government equipment or nonpublic information in the course of their activities. *See* 5 C.F.R. 735.203-735.206 (1990 ed.).

Such restrictions were designed to give civil servants freedom to engage in outside personal and professional activities, including those for remuneration, so long as there was no real or perceived conflict with their public responsibilities. Recognizing that some outside activities

—particularly teaching, lecturing and writing—could enhance the employee's professional standing and his or her value to the agency, the regulations affirmatively encouraged participation in those activities. *Id.* at 735.203(c); C.A. Joint Appendix 104-5, 116.

On November 30, 1989, Congress passed the Ethics Reform Act of 1989 (Pub. L. No. 101-194, 103 Stat. 1716) amending the Ethics in Government Act of 1978. The relevant provisions, which took effect January 1, 1991, provided that "[a]n individual may not receive any honorarium while that individual is a Member, officer or employee." 5 U.S.C. app. 501(b). Section 505, as originally enacted, defined "honorarium" as "a payment of money or any thing of value for an appearance, speech or article . . . by a Member, officer or employee, excluding any actual and necessary travel expenses. . . ." 5 U.S.C. app. 505(3) (Supp. I 1989).

The prohibition on acceptance of "honoraria" was originally applicable to all officers and employees of the executive and judicial branches, including employees at the very lowest grades, and to members of the House of Representatives and their staff, but not to Senators and their staff. 5 U.S.C. app. 505(1), (2). The prohibitions relating to honoraria and limitations on outside income were coupled with a 25-percent pay increase for members of the House, the judiciary, and senior executive branch officials. Pub. L. No. 101-194, Title VII, Sec. 703, 5 U.S.C. 5318 note. Lower graded executive branch employees did not receive this generous pay increase.

Senators and their staff, who were not initially covered by the honoraria ban, did not receive a 25-percent pay increase at that time. Pub. L. No. 101-194, Title XI, Sec. 1101, 5 U.S.C. 5305 note. In the Congressional Operations Appropriations Act of 1991, Congress extended both the ban on receipt of honoraria and the accompanying pay increase to Senators and their staff. Pub.

L. No. 102-90, Tit. I, § 6(b)(2), 105 Stat. 450, 5 U.S.C. 5318 note.

The 1991 Appropriations Act also amended Section 505 of the Ethics Reform Act to deal specifically with series of appearances, speeches, or articles. *Id.* at Tit. III, § 314(b), 105 Stat. 469. Effective January 1, 1992, the definition of "honorarium" read as follows:

The term "honorarium" means a payment of money or any thing of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government) by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual * * *.

5 U.S.C. app. 505(3) (Supp. IV 1992).¹

2. Shortly before the effective date of Section 501(b), two federal employee unions and several individual career executive branch employees commenced actions in the United States District Court for the District of Columbia challenging the constitutionality of the ban on receipt of compensation for expressive activity and seeking injunctive relief.² The National Treasury Employees Union was certified as the class representative of all executive branch employees below the grade of GS-16 who would receive "honoraria" but for the prohibitions of Section 501(b). Pet. App. 3a.

¹ Pursuant to authority granted it by 5 U.S.C. app. 503 to issue rules and regulations with respect to officers and employees of the executive branch, the Office of Government Ethics has promulgated extensive regulations interpreting this statutory language. 5 C.F.R. 2636.201 *et seq.* (1993 ed.), set forth at Pet. App. 114a-134a.

² NTEU later amended its complaint to include as a plaintiff its local chapter 143, which was adversely affected by the ban on receipt of honoraria because the federal employee who had written its newsletter refused to continue doing so without compensation.

The undisputed factual record established that individual plaintiffs were full-time career executive branch employees who had written or spoken for valuable consideration prior to the effective date of the Act. Pet. App. 60a-61a. On their own time and using their own resources, they had addressed a variety of subjects unrelated to their official duties. *Id.* at 60a-61a & n.1. The individual plaintiffs included, among others, a Nuclear Regulatory Commission attorney who was working on articles on Russian history, a mailhandler who wrote and spoke about the Quaker religion, a Department of Labor attorney who delivered lectures on Judaism, and an employee of the Department of Health and Human Services who free-lanced as a theater critic for local newspapers. Pet. App. 9a-10a.

Following the enactment of the ban, the plaintiffs' practical ability and incentive to engage in these expressive activities were significantly affected. The plaintiffs were forced to curtail, and in some cases to cease, their writing and speaking activity. C.A. Joint Appendix 61, 103-04, 189, 191-92, 228, 243.

3. The district court granted summary judgment in favor of the plaintiffs. Pet. App. 78a. Applying the teachings of *Simon & Schuster, Inc. v. New York State Crime Victims' Board*, — U.S. —, 112 S. Ct. 501 (1992), the court held that the prohibition at issue directly burdened plaintiffs' First Amendment right of free speech by acting as a financial disincentive to constitutionally protected expressive activity. Pet. App. 63a-64a.

The court concluded that the "honoraria" ban was unconstitutionally over-inclusive because—although ostensibly intended to eliminate the possibility of official corruption—it proscribed compensation "even when there is neither the possibility nor a perception that the office and the payment are interdependent." Pet. App. 70a. The ban was also underinclusive, the district court determined, because it singled out "appearances, speeches, and

articles," while permitting payment for a "myriad" of other forms of expression "on the same subject, from the same supplicant in quest of the same government favor." Pet. App. 70a. See also *id.* at 73a.

As relief, the court struck down the honoraria ban as applied to executive branch employees, while leaving it intact as applied to the legislative and judicial branches. Pet. App. 78a. Finding that the focus of congressional concern was the correction of perceived abuses in receipt of honoraria by Members of Congress themselves, the court concluded that Congress would have enacted the provision even without the extension of the ban to all federal employees. *Id.* at 73a-78a.

4. The court of appeals affirmed in a 2-1 decision. Pet. App. 1a-8a. Applying the test articulated in *Pickering v. Board of Education*, 391 U.S. 563 (1968), the court concluded that Section 501(b) violates the First Amendment right of federal employees to speak on matters of public concern because it restricts substantially more speech than necessary to serve the governmental interest in avoiding impropriety or the appearance of impropriety. Pet. App. 3a-14a.

The court observed that "there would have to be some sort of nexus between the employee's job and either the subject matter of the expression or the character of the payor" in order to create "the sort of impropriety or appearance of impropriety at which the statute is evidently aimed." Pet. App. 9a. The ban in Section 501(b) however, reached much activity with "no nexus to government work that could give rise to the slightest concern." *Id.* at 10a.

The "excess sweep" of the ban, the court observed, could not be justified as a "prophylactic" measure. Pet. App. 11a-14a. As the court pointed out, there was no showing of improprieties that would be remedied by the ban "but not by prior regulations" or of "any serious enforcement or line-drawing costs associated with those reg-

ulations." *Id.* at 11a. Further, the court found, there was no suggestion of any actual public perception of a risk of corruption in the receipt of compensation by low-level government employees for speech unrelated to their duties to audiences that are equally unrelated. *Id.* at 13a.

Addressing the proper remedy, the court applied the settled principle that it should "refrain from invalidating more of the statute than is necessary." Pet. App. 14a (citation omitted). The court therefore left Section 501(b) intact as applied to the legislative and judicial branches and invalidated it as applied to the executive branch. *Id.* at 14a-18a.

The court declined to modify Section 501(b) so as to preserve a ban on compensation when there was an "appropriate nexus" between the employee's job and the appearance, speech, or article; it declared the articulation of such a test to be "a purely legislative act." Pet. App. 14a. Finding no "construction that would trim off all or even most of the invalid applications to executive branch employees," the court held the section unconstitutional as applied to that branch. *Id.*

Judge Sentelle, in dissent, argued that the majority had erred in treating this case as a facial challenge to Section 501(b), rather than as a challenge to the ban as applied to plaintiffs. Pet. App. at 20a-30a. He also contended that the ban was sufficiently "narrowly tailored," even without a job nexus, given the government interest in avoiding the appearance of impropriety and administrative difficulties. *Id.* at 30a-52a.³

5. The United States sought rehearing and suggested rehearing en banc. The court of appeals denied the petition for rehearing and, over the dissents of Judges Sentelle

³ Judge Sentelle also took issue with the majority's mode of severance (*id.* at 52a-57a), arguing that its conclusions regarding the ban's facial invalidity should have led it to strike down the ban as to all "officers and employees," leaving it in place only with respect to Members of Congress. Pet. App. 57a.

and Silberman, rejected the suggestion for rehearing en banc. Pet. App. 79a-81a.

ARGUMENT

The decision of the court of appeals does not present an issue of sufficient legal or practical importance to warrant review by this Court. In ruling the "honoraria" ban unconstitutional because it is broader than reasonably necessary to serve a substantial government interest, the court of appeals relied on well-settled principles, advanced by the government, that are applicable to laws burdening the exercise of First Amendment rights in the public employment context. The decision simply represents the judgment of a majority of the court, agreeing with the district court, that the operation of this particular statute does not "fit" with the congressional concerns that motivated its enactment and therefore is an undue burden on speech. That decision does not conflict with any decision of this Court or any court of appeals; moreover, it will have virtually no impact on the federal employee standards of conduct. Accordingly, this Court should decline further review.

1. While the decision of the court of appeals is important to the individuals affected, its reach is far less broad, and its practical import for the federal government in general is far less significant, than urged by the government. See Pet. 6.

a. First, the impact of the lower court decision is limited, by its terms, to *executive branch* employees. Members of Congress and officers and employees of the legislative and judicial branches are still barred from accepting honoraria. Moreover, even within the executive branch, the practical effect of the decision is limited by other restrictions imposed by executive order. Certain senior "noncareer" executive branch employees remain forbidden to accept *any* "outside earned income," regard-

less of its source. See Pet. App. 17a.⁴ Other noncareer employees, such as noncareer Senior Executive Service employees and senior Schedule C employees, are subject to a 15 percent limitation on outside earned income. 5 C.F.R. 2636.303, 304.⁵

Thus, the only individuals now free to accept compensation for their writing and speaking without express monetary limitations are career executive branch employees and lower graded noncareer employees. Even as to these individuals, the court of appeals' decision leaves in place a comprehensive system of statutes and regulations designed to prohibit any conduct that could give rise to impropriety or the appearance of impropriety.

Under those regulations, *any* activity by an executive branch employee, including any writing, speaking, or appearance, that "conflicts with an employee's official duties" is prohibited. 5 C.F.R. 2635.802. App. 4a-5a. Federal statutes, further, prohibit receipt of compensation for government service or supplementation of salary from a private party (18 U.S.C. 209 (1988 & Supp. IV 1992)), as well as solicitation or receipt of bribes (18 U.S.C. 201(b) and (c)). In short, the only practical effect of the decision below is to relieve employees of the honoraria ban's *additional* prohibition against receipt of compensa-

⁴ Under Executive Order 12674 (April 12, 1989), 3 C.F.R. 215 (1990), a "covered noncareer employee"—namely, one who is paid at the rate of GS-16 or higher—who is a presidential appointee (with certain exceptions set forth in 5 C.F.R. 2636.303(a)(1)) is prohibited from receiving "any outside earned income for outside employment or any other activity performed during that Presidential appointment." See 5 C.F.R. 2636.302(a); 5 C.F.R. 2635.804.

⁵ The Senior Executive Service includes both career and non-career supervisors and managers in positions whose rate of pay exceeds that of GS-15. See 5 C.F.R. 214.201 *et seq.* (1993 ed.). Schedule C employees are appointed to positions of a confidential or policy-determining character and are excepted from the competitive service. See 5 C.F.R. 213.3301 *et seq.* (1993 ed.).

tion for activity that *does not* create a conflict of interest or the appearance of a conflict with their official duties.⁶

b. Further, the court of appeals' decision will have virtually no impact on the overriding congressional purpose in enacting the honoraria ban because executive branch employees—and particularly career employees—were never the focus of congressional concern. There is no evidence of a perception by *any* Member of Congress that the receipt of outside income by career government employees had been abused. On the contrary, as the district court and the court of appeals both noted, the legislative history clearly indicates that "Congress was principally concerned that the receipt of honoraria by Members of Congress created the appearance of influence-buying." Pet. App. 15a. *See also id.* at 16a, 75a-77a.⁷

In urging that the court of appeals decision will interfere significantly with policies Congress has deemed important, the government relies exclusively and unpersuasively on the reports of two Commissions. One of those,

⁶ Recognizing that the court's decision leaves a comprehensive system of regulatory and statutory prohibitions in place, the government nonetheless suggests that the system might somehow be inadequate because one remedy for violations of Section 501(b)—the recapture of unlawfully received compensation—"is not necessarily available under other provisions." Pet. 12 n.10. Even assuming that "recapture" is not available, however, that remedy pales in significance when compared to such existing remedies as criminal sanctions and disciplinary action, up to and including discharge. Given existing rules, defendant Stephen D. Potts, Director of the Office of Government Ethics and the official charged with administering the Act, has stated that, in his opinion, the ban is "not necessary to protect the integrity of the government." C.A. Joint Appendix 127-29.

⁷ Virtually all legislative references are to Members of Congress themselves. While there are a few references to senior executive branch officials and the judiciary (*see, e.g.*, 135 Cong. Rec. H8746, H8747 (daily ed. Nov. 16, 1989) (statement of Rep. Fazio); S15987 (daily ed. Nov. 17, 1989) (statement of Sen. Mitchell)), there is no discussion of abuses by such officials.

the Report of the 1989 Quadrennial Commission on Executive, Legislative, and Judicial Salaries, merely recommended, without any discussion or supporting findings, "that the practice of accepting honoraria in all three branches be terminated by statute." C.A. Joint Appendix 39. There is no indication that, in so recommending, the Commission ever contemplated a prohibition on career employees' acceptance of compensation for expressive activity unrelated to their duties.

Importantly, that Commission's definition of "honoraria" did not include payment for written work. Nor did its definition seem to encompass the receipt of payment from persons or groups not involved in the legislative process. Rather, it defined "honoraria" as "payments for public appearances to deliver a talk or engage in a colloquy at the invitation of some non-governmental group, often one with a material interest in pending or anticipated legislation." *Id.*

The other report, prepared by the Wilkey Commission, borrowed the Quadrennial Commission's definition of "honoraria" and echoed its recommendation based on a concern for "uniformity" and "equitable limitations across the government."⁸ C.A. Joint Appendix 139-140. Both the definition of "honoraria" and the cursory treatment of the issue underscore that, as both the district court and court of appeals recognized, the true focus of the reform effort was on the elimination of congressional acceptance of payments from constituent groups. The measure designed to address the concern—the ban on congressional acceptance of honoraria—remains unaffected by the court of appeals' decision.⁹

⁸ The Court should hesitate to assign weight to the Wilkey Commission's recommendations in any event, for Congress evidently discounted its goal of uniformity: as discussed *supra*, the initial statutory provision did not include Senators and their staff within the scope of the ban.

⁹ Congressional disinterest in the application of the honoraria ban to executive branch employees is evident in the virtually

2. Moreover, the court of appeals' decision does not warrant review because its rationale and result are fully consistent with settled principles applied by this Court in assessing the constitutionality of restrictions on government employee speech.

a. The court of appeals applied the balancing test set forth in *Pickering v. Board of Education*, *supra*, under which "the interests of the [employee], as a citizen, in commenting upon matters of public concern" are balanced against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. Under the test, the governmental interest must be a "substantial" one, "unrelated to the suppression of free expression." *Brown v. Glines*, 444 U.S. 348, 354 (1980). Further, the government may "restrict speech no more than is reasonably necessary" to protect that substantial interest. *Id.* at 355. *Cf. Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (government regulation may not "burden substantially more speech than is necessary to further the government's legitimate interests").

The court of appeals concluded that the ban on compensation for any article-writing or speaking restricted more speech than was reasonably necessary to further the governmental interest in guarding against the appearance of impropriety. In essence, the court found that a ban imposed even in the absence of a nexus between the employee's job and either the subject matter of the expression or the identity of the payor did not reasonably "fit" the end it purportedly served. That conclusion is well founded

unanimous congressional support for measures to amend the statute to eliminate a flat government-wide ban. See discussion of congressional action at Pet. App. 90a-92a (Silberman, J., dissenting from the denial of rehearing *en banc*) (noting unanimous Senate support for an amendment); *id.* at 78a n.15 (Jackson, J.) (noting House passage of an amendment, which was not considered by the Senate because of the objections of a single senator).

on record evidence demonstrating the ban's impact and on the court's analysis of the expressions of legislative intent underlying the law. See *supra* at 8-10.

b. In its petition, the government takes issue, not with the test the court of appeals used, but with the result it reached. At its core, the government's argument is simply an assertion that the court should have struck the balance in favor of the governmental interest. Resolution of that disagreement, of course, does not warrant this Court's consideration; moreover, the government's various critiques of the court of appeals' conclusions lack merit.

The court of appeals properly rejected the notion, advanced here by the government, that the ban was reasonable in scope because Congress "could have" been concerned about the appearance of impropriety, even absent a nexus. See Pet. 8. Not only are there no "prior examples of abuse" that might raise the concern suggested by the government (*see id.* at 8 n.6) but, as the court of appeals recognized (Pet. App. 13a), there is no logical reason to infer it likely "that the public actually perceives a risk of corruption in receipt by low-level government employees of remuneration on topics that are wholly unrelated to their function, to audiences that are equally unrelated." ¹⁰

¹⁰ The court of appeals correctly observed that less evidence is necessary when "the evil to be averted" would ordinarily be concealed. Pet. App. 13a. Such is not the case here. There is no reason to think that it would be unusually difficult to demonstrate a public perception of impropriety in receipt of payment by low-level government employees for these kinds of expressive activities, if that perception existed. Certainly, Congress had before it much evidence that receipt of honoraria by members of its own body created a perception of impropriety. The source of concern posited by the government is, therefore, very different from the evils regulated by the Hatch Act. *Cf. Pet. 8, n.6*, citing *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). One of the goals of the Hatch Act was to prevent supervisors from pressuring lower level employees to vote in a certain way or perform political chores to curry favor. In that context, the court of appeals recognized,

The government's additional argument—that the “excessive sweep” of the ban may be justified as a reasonable “prophylactic” measure—is equally unavailing, given the utter lack of any legislative findings or evidence before Congress of the need for such a prophylactic. As this Court has recently recognized, a restriction on speech—which, of course, brings the First Amendment into play—must be supported by more than a mere “hypothetical possibility” of abuse, even when it could be characterized as a “prophylactic measure.”¹¹ See *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 498 (1985); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978). Indeed, because “[b]road prophylactic rules in the area of free expression are suspect” (*NAACP v. Button*, 371 U.S. 415, 438 (1962) (citations omitted)), courts must scrutinize with unusual care the legislative findings or record evidence supporting congressional action. *Sable Communications of California v. FCC*, 492 U.S. 115, 129 (1989). It was by reviewing the findings and evidence in light of those settled principles that both lower courts reached their decision that the statute is too broad.

“[t]he potential for such subtle pressures is not only pervasive but inherently difficult to demonstrate or assess; thus, the absence of episodes coming to light is quite consistent with the Congressional concern.” Pet. App. 13a.

¹¹ Even the government's characterization of Section 501(b) as a prophylactic measure is suspect. While it terms the measure a “complete and impermeable ban” (Pet. 9) and “a uniform and complete ban” (*id.* at 6), the ban is, in fact, decidedly permeable. Initially, of course, the ban did not even cover Senators and their staffs, despite widespread concern over the appearance of impropriety in their acceptance of honoraria. The statute, in addition, prohibited the acceptance of honoraria only for “an appearance, speech, or article,” thereby permitting payment for what the district court termed the “myriad other forms of expression” on the same subject from the same audience (Pet. App. 70a). The regulations issued by OGE have added countless exceptions, which have simply underscored the arbitrary nature of the ban's coverage. See Pet. App. 70a-71a, 73a.

The government's effort to manufacture a conflict between the court of appeals' application of these principles to the facts of this case, and *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), is unpersuasive. In *Mitchell*, the Court upheld the Hatch Act prohibitions in the context of a demonstrated “menace” of public employee involvement in partisan politics. 330 U.S. at 103. The executive branch had regulated such involvement for decades before Congress enacted legislation. That regulation, moreover, was approved in some form by both the courts and “a large body of informed public opinion.” *Id.*

Similarly, when this Court returned to the issue in *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 557 (1973), it underscored the “judgment of history,” which showed that vital government interests were clearly at risk when public employees became involved in partisan politics. The Court further cited the abundant record evidence demonstrating a clear need to protect government workers from supervisory coercion; to ensure merit-based employment decisions; and to guard against real and apparent abuses in enforcement of the law. *Id.* at 564-566.

A documented record of abuse and decades of regulation in the Hatch Act cases formed the basis for clearly articulated congressional concerns. Here, in marked contrast, there is no history of specific abuses and the legislative record is virtually silent on any subject other than receipt of honoraria by Members of Congress. The court of appeals' analysis and conclusions are thus fully consistent with this Court's Hatch Act precedents and do not warrant further review by this Court.

3. The court of appeals' decision to invalidate section 501(b) with respect to those as to whom a constitutional defect had been shown—namely, executive branch employees—was also correct and does not merit further review. Because the ban was not adequately tailored with respect to employees in the executive branch, it fell “short

of constitutional demands" "on its face and therefore in all of its applications" within that branch. See *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 967 n.13 (1984).

The government cites no authority that required the court of appeals to write into the statute language identifying and defining the circumstances in which there would exist an adequate "nexus between the subject matter of the expression or the character of the payor." Pet. 10-11, quoting Pet. App. 9a.¹² In fact, such an action would have contravened the time-honored rule that courts are not to "introduce words of limitation in order to uphold the valid applications" of a challenged statute. 2 N. Singer, *SUTHERLAND STATUTORY CONSTRUCTION* § 44.16, at 529 (4th ed. 1986) (citing cases). As this Court explained more than 100 years ago, it cannot sustain the constitutionality of a statute by inserting words "that are not now there," for to do so "would be to make a new law, not to enforce an old one." *United States v. Reese*, 92 U.S. 214, 221 (1875).¹³

¹² Significantly, the government waited until its petition for rehearing to suggest that the court of appeals should have crafted its own nexus test. Although the district court had, like the court of appeals, invalidated the ban as applied to the executive branch, the government did not object to the order on that basis in its opening brief to the court of appeals. Instead, it advanced arguments that it has here abandoned: that the district court had erred in including employees who were not addressing "matters of public concern" and in extending relief beyond the members of the certified class—employees in the executive branch below the grade of GS-16. Government's Brief, filed August 31, 1992, at 27 n.58. It was not until the petition for rehearing that the government argued that the court should have limited its order to the "invalid applications" by articulating a nexus test. Pet. for Reh., filed May 14, 1993, at 10. Cf. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 383-85 (1989) (suggesting certiorari might have been denied had Court been notified at the appropriate stage of the proceedings of the inexactness of the various presentations of the issue below).

¹³ Even with a severability provision, the Court should not "dissect an unconstitutional measure and reframe a valid one out

The need for judicial forbearance is particularly pointed here, where the suggested limitation is the insertion of a "nexus test."¹⁴ The court of appeals below correctly observed that "[a]rticulation of some appropriate nexus test would seem a purely legislative act." Pet. App. 14a.¹⁵

In short, it is the court's responsibility to strike down an unconstitutional provision, not to determine which of several options should be selected in reframing the provision to meet constitutional concerns. The court of appeals resolved this issue correctly, and further review by this Court is not warranted.

of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court." *Hill v. Wallace*, 259 U.S. 44, 70 (1922). *Accord*, *Wyoming v. Oklahoma*, — U.S. —, 112 S. Ct. 789, 803-04 (1992) ("clearly not this Court's province to rewrite a state statute").

¹⁴ Congress has wrestled with the exact bounds of a nexus test; the House and Senate bills contained somewhat different job relatedness tests, together with different definitions of covered employees and prior reporting requirements. Compare H.R. 3341, which was passed by the House of Representatives on November 25, 1991, with S. 242 and accompanying report, S. Rep. No. 102-29, 102d Cong., 1st Sess. (1991) at 8-14 (both appended to our brief to the court of appeals). The nexus test that the government would have the court of appeals graft onto Section 501(b) is yet a third version.

¹⁵ The government incorrectly reasons that "[i]f the nexus concept serves to identify the unconstitutional applications of Section 501(b), . . . it can also serve to identify the constitutional applications of Section 501(b)." Pet. 11 (emphasis in original). This argument ignores the wide variety of routes available to Congress in redrafting Section 501(b) to satisfy constitutional concerns. The lower court merely found no impropriety or appearance of impropriety in the absence of "some sort" of a nexus. Pet. App. 9a. The court further left open the possibility that Congress could enact a broad prophylactic rule barring "honoraria" even in the absence of a nexus, if it were to make the requisite findings concerning the possibility of abuse to support that action. *Id.* at 12a-14a.

CONCLUSION

The petition for a writ of certiorari should be denied.

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APPENDIX

APPENDIX

**PART 2635—STANDARDS OF ETHICAL CONDUCT FOR
EMPLOYEES OF THE EXECUTIVE BRANCH (Eff.
2-3-93)****Subpart H—Outside Activities****§ 2635.801 Overview.**

(a) This subpart contains provisions relating to outside employment, outside activities and personal financial obligations of employees that are in addition to the principles and standards set forth in other subparts of this part. Several of these provisions apply to uncompensated as well as to compensated outside activities.

(b) An employee who wishes to engage in outside employment or other outside activities must comply with all relevant provisions of this subpart, including, when applicable:

(1) The prohibition on outside employment or any other outside activity that conflicts with the employee's official duties;

(2) Any agency-specific requirement for prior approval of outside employment or activities;

(3) The limitations on receipt of outside earned income by certain Presidential appointees and other non-career employees;

(4) The limitations on paid and unpaid service as an expert witness;

(5) The limitations on participation in professional organizations;

(6) The limitations on paid and unpaid teaching, speaking, and writing; and

(7) The limitations on fundraising activities.

(c) Outside employment and other outside activities of an employee must also comply with applicable provisions

set forth in other subparts of this part and in supplemental agency regulations. These include the principle that an employee shall endeavor to avoid actions creating an appearance of violating any of the ethical standards in this part and the prohibition against use of official position for an employee's private gain or for the private gain of any person with whom he has employment or business relations or is otherwise affiliated in a nongovernmental capacity.

(d) In addition to the provisions of this and other subparts of this part, an employee who wishes to engage in outside employment or other outside activities must comply with applicable statutes and regulations. Relevant provisions of law, many of which are listed in subpart I of this part, may include:

(1) 18 U.S.C. 201(b), which prohibits a public official from seeking, accepting or agreeing to receive or accept anything of value in return for being influenced in the performance of an official act or for being induced to take or omit to take any action in violation of his official duty;

(2) 18 U.S.C. 201(c), which prohibits a public official, otherwise than as provided by law for the proper discharge of official duty, from seeking, accepting, or agreeing to receive or accept anything of value for or because of any official act;

(3) 18 U.S.C. 203(a), which prohibits an employee from seeking, accepting, or agreeing to receive or accept compensation for any representational services, rendered personally or by another, in relation to any particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, or other specified entity. This statute contains several exceptions, as well as standards for special Government employees that limit the scope of the restriction;

(4) 18 U.S.C. 205, which prohibits an employee, whether or not for compensation, from acting as agent

or attorney for anyone in a claim against the United States or from acting as agent or attorney for anyone, before any department, agency, or other specified entity, in any particular matter in which the United States is a party or has a direct and substantial interest. It also prohibits receipt of any gratuity, or any share of or interest in a claim against the United States, in consideration for assisting in the prosecution of such claim. This statute contains several exceptions, as well as standards for special Government employees that limit the scope of the restrictions;

(5) 18 U.S.C. 209, which prohibits an employee, other than a special Government employee, from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a Government employee. The statute contains several exceptions that limit its applicability;

(6) The Emoluments Clause of the United States Constitution, article I, section 9, clause 8, which prohibits anyone holding an office of profit or trust under the United States from accepting any gift, office, title or emolument, including salary or compensation, from any foreign government except as authorized by Congress. In addition, 18 U.S.C. 219 generally prohibits any public official from being or acting as an agent of a foreign principal, including a foreign government, corporation or person, if the employee would be required to register as a foreign agent under 22 U.S.C. 611 *et seq.*;

(7) The Hatch Act, 5 U.S.C. 7321 through 7328, which prohibits most employees from engaging in certain partisan political activities and prohibits all employees from interfering with elections and conducting political activities in the Federal workplace;

(8) The honorarium prohibition, 5 U.S.C. App. (Ethics in Government Act of 1978), which prohibits an employee, other than a special Government employee, from receiving any compensation for an appearance, speech or

article. Implementing regulations are contained in §§ 2636.201 through 2636.205 of this chapter; and

(9) The limitations on outside employment, 5 U.S.C. App. (Ethics in Government Act of 1978), which prohibit a covered noncareer employee's receipt of compensation for specified activities and provide that he shall not allow his name to be used by any firm or other entity which provides professional services involving a fiduciary relationship. Implementing regulations are contained in §§ 2636.305 through 2636.307 of this chapter.

[57 FR 35041, Aug. 7, 1992; 57 FR 48557, Oct. 27, 1992]

§ 2635.802 Conflicting outside employment and activities.

An employee shall not engage in outside employment or any other outside activity that conflicts with his official duties. An activity conflicts with an employee's official duties:

(a) If it is prohibited by statute or by an agency supplemental regulation; or

(b) If, under the standards set forth in §§ 2235.402 and 2635.502, it would require the employee's disqualification from matters so central or critical to the performance of his official duties that the employee's ability to perform the duties of his position would be materially impaired.

Employees are cautioned that even though an outside activity may not be prohibited under this section, it may violate other principles or standards set forth in this part or require the employee to disqualify himself from participation in certain particular matters under either subpart D or subpart E of this part.

Example 1: An employee of the Environmental Protection Agency has just been promoted. His principal

duty in his new position is to write regulations relating to the disposal of hazardous waste. The employee may not continue to serve as president of a nonprofit environmental organization that routinely submits comments on such regulations. His service as an officer would require his disqualification from duties critical to the performance of his official duties on a basis so frequent as to materially impair his ability to perform the duties of his position.

Example 2: An employee of the Occupational Safety and Health Administration who was and is expected again to be instrumental in formulating new OSHA safety standards applicable to manufacturers that use chemical solvents has been offered a consulting contract to provide advice to an affected company in restructuring its manufacturing operations to comply with the OSHA standards. The employee should not enter into the consulting arrangement even though he is not currently working on OSHA standards affecting this industry and his consulting contract can be expected to be completed before he again works on such standards. Even though the consulting arrangement would not be a conflicting activity within the meaning of § 2635.802, it would create an appearance that the employee had used his official position to obtain the compensated outside business opportunity and it would create the further appearance of using his public office for the private gain of the manufacturer.

§ 2635.803 Prior approval for outside employment and activities.

When required by agency supplemental regulation, an employee shall obtain prior approval before engaging in outside employment or activities. Where it is determined to be necessary or desirable for the purpose of administering its ethics program, an agency shall, by supplemental regulation, require employees or any category of employees to obtain prior approval before engaging in specific types of outside activities, including outside employment.

NOTE: Any requirement for prior approval of employment or activities contained in any agency regulation, instruction, or other issuance in effect prior to the effective date of this part shall constitute a requirement for prior approval for purposes of this section for one year after the effective date of this part or until issuance of an agency supplemental regulation, whichever occurs first.

§ 2635.804 Outside earned income limitations applicable to certain Presidential appointees and other noncareer employees.

(a) *Presidential appointees to fulltime noncareer positions.* A Presidential appointee to a full-time noncareer position shall not receive any outside earned income for outside employment, or for any other outside activity, performed during that Presidential appointment. This limitation does not apply to any outside earned income received for outside employment, or for any other outside activity, carried out in satisfaction of the employee's obligation under a contract entered into prior to April 12, 1989.

(b) *Covered noncareer employees.* Covered noncareer employees, as defined in § 2636.303(a) of this chapter, may not, in any calendar year, receive outside earned income attributable to that calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under 5 U.S.C. 5313, as in effect on January 1 of such calendar year. Employees should consult the regulations implementing this limitation, which are contained in §§ 2636.301 through 2636.304 of this chapter.

NOTE: In addition to the 15 percent limitation on outside earned income, covered noncareer employees are prohibited from receiving any compensation for: practicing a profession which involves a fiduciary relationship; affiliating with or being employed by a firm or other entity which provides professional services involving a fiduciary

relationship; serving as an officer or member of the board of any association, corporation or other entity; or teaching without prior approval. Implementing regulations are contained in §§ 2636.305 through 2636.307 of this chapter.

(c) *Definitions.* For purposes of this section:

(1) *Outside earned income* has the meaning set forth in § 2636.303(b) of this chapter, except that § 2636.303(b)(8) shall not apply.

(2) *Presidential appointee to a fulltime noncareer position* means any employee who is appointed by the President to a full-time position described in 5 U.S.C. 5312 through 5317 or to a position that, by statute or as a matter of practice, is filled by Presidential appointment, other than:

(i) A position filled under the authority of 3 U.S.C. 105 or 3 U.S.C. 107(a) for which the rate of basic pay is less than that for GS-9, step 1 of the General Schedule;

(ii) A position, within a White House operating unit, that is designated as not normally subject to change as a result of a Presidential transaction;

(iii) A position within the uniformed services; or

(iv) A position in which a member of the foreign service is serving that does not require advice and consent of the Senate.

Example 1: A career Department of Justice employee who is detailed to a policymaking position in the White House Office that is ordinarily filled by a noncareer employee is not a Presidential appointee to a full-time noncareer position.

Example 2: A Department of Energy employee appointed under § 213.3301 of this title to a Schedule C position is appointed by the agency and, thus, is not a Presidential appointee to a full-time noncareer position.

§ 2635.805 Service as an expert witness.

(a) *Restriction.* An employee shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which the United States is a party or has a direct and substantial interest, unless the employee's participation is authorized by the agency under paragraph (c) of this section. Except as provided in paragraph (b) of this section, this restriction shall apply to a special Government employee only if he has participated as an employee or special Government employee in the particular proceeding or in the particular matter that is the subject of the proceeding.

(b) *Additional restriction applicable to certain special Government employees.* (1) In addition to the restriction described in paragraph (a) of this section, a special Government employee described in paragraph (b)(2) of this section shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a court or agency of the United States in which his employing agency is a party or has a direct and substantial interest, unless the employee's participation is authorized by the agency under paragraph (c) of this section.

(2) The restriction in paragraph (b)(1) of this section shall apply to a special Government employee who:

- (i) Is appointed by the President;
- (ii) Serves on a commission established by statute; or
- (iii) Has served or is expected to serve for more than 60 days in a period of 365 consecutive days.

(c) *Authorization to serve as an expert witness.* Provided that the employee's testimony will not result in compensation for an appearance in violation of § 2636.201 of this chapter or violate any of the principles or standards set forth in this part, authorization to provide

expert witness service otherwise prohibited by paragraphs (a) and (b) of this section may be given by the designated agency ethics official of the agency in which the employee serves when:

(1) After consultation with the agency representing the Government in the proceeding or, if the Government is not a party, with the Department of Justice and the agency with the most direct and substantial interest in the matter, the designated agency ethics official determines that the employee's service as an expert witness is in the interest of the Government; or

(2) The designated agency ethics official determines that the subject matter of the testimony does not relate to the employee's official duties within the meaning of § 2635.807(a)(2)(i).

(d) Nothing in this section prohibits an employee from serving as a fact witness when subpoenaed by an appropriate authority.

§ 2635.806 Participation in professional associations. [Reserved]

§ 2635.807 Teaching, speaking and writing.

(a) *Compensation for teaching, speaking or writing.* Except as permitted by paragraph (a)(3) of this section, an employee, including a special Government employee, shall not receive compensation from any source other than the Government for teaching, speaking or writing that relates to the employee's official duties.

(1) *Relationship to other limitations on receipt of compensation.* The compensation prohibition contained in this section is in addition to any other limitation on receipt of compensation set forth in this chapter, including:

(i) The honorarium prohibition on receipt of compensation for an appearance, speech or article, which is im-

plemented in §§ 2636.201 through 2636.205 of this chapter;

(ii) The requirement contained in § 2636.307 of this chapter that covered noncareer employees obtain advance authorization before engaging in teaching for compensation; and

(iii) The prohibitions and limitations in § 2635.804 and in § 2636.304 of this chapter on receipt of outside earned income applicable to certain Presidential appointees and to other covered noncareer employees.

Example 1. A personnel specialist employed by the Department of Labor has been asked by the publisher of a magazine to write an article on his hobby of collecting arrowheads. Even though the subject matter is unrelated to his official duties, he may not accept the publisher's offer of \$200 for the article. Because the compensation offered is for an article, its receipt would violate the honorarium prohibition contained in §§ 2636.201 through 2636.205 of this chapter.

(2) *Definitions.* For purposes of this paragraph:

(i) Teaching, speaking or writing relates to the employee's official duties if:

(A) The activity is undertaken as part of the employee's official duties;

(B) The circumstances indicate that the invitation to engage in the activity was extended to the employee primarily because of his official position rather than his expertise on the particular subject matter;

(C) The invitation to engage in the activity or the offer of compensation for the activity was extended to the employee, directly or indirectly, by a person who has interests that may be affected substantially by performance or nonperformance of the employee's official duties;

(D) The information conveyed through the activity draws substantially on ideas or official data that are non-public information as defined in § 2635.703(b); or

(E) Except as provided in paragraph (a)(2)(i)(E)(4) of this section, the subject of the activity deals in significant part with:

(1) Any matter to which the employee presently is assigned or to which the employee had been assigned during the previous one-year period;

(2) Any ongoing or announced policy, program or operation of the agency; or

(3) In the case of a noncareer employee as defined in § 2636.303(a) of this chapter, the general subject matter area, industry, or economic sector primarily affected by the programs and operations of his agency.

(4) The restrictions in paragraphs (a)(2)(i)(E)(2) and (3) of this section do not apply to a special Government employee. The restriction in paragraph (a)(2)(i)(E)(1) of this section applies only during the current appointment of a special Government employee; except that if the special Government employee has not served or is not expected to serve for more than 60 days during the first year or any subsequent one year period of that appointment, the restriction applies only to particular matters involving specific parties in which the special Government employee has participated or is participating personally and substantially.

NOTE: Section 2635.807(a)(2)(i)(E) does not preclude an employee, other than a covered noncareer employee, from receiving compensation for teaching, speaking or writing on a subject within the employee's discipline or inherent area of expertise based on his educational background or experience even though the teaching, speaking or writing deals generally with a subject within the agency's areas of responsibility.

Example 1: The Director of the Division of Enforcement at the Commodity Futures Trading Commission has a keen interest in stamp collecting and has spent years developing his own collection as well as studying the field generally. He is asked by an international society of philatelists to give a series of four lectures on how to assess the value of American stamps. Because the subject does not relate to his official duties, the Director may accept compensation for the lecture series. He could not, however, accept a similar invitation from a commodities broker.

Example 2: A scientist at the National Institutes of Health, whose principal area of Government research is the molecular basis of the development of cancer, could not be compensated for writing a book which focuses specifically on the research she conducts in her position at NIH, and thus, relates to her official duties. However, the scientist could receive compensation for writing or editing a textbook on the treatment of all cancers, provided that the book does not focus on recent research at NIH, but rather conveys scientific knowledge gleaned from the scientific community as a whole. The book might include a chapter, among many other chapters, which discusses the molecular basis of cancer development. Additionally, the book could contain brief discussions of recent developments in cancer treatment, even though some of those developments are derived from NIH research, as long as it is available to the public.

Example 3: On his own time, a National Highway Traffic Safety Administration employee prepared a consumer's guide to purchasing a safe automobile that focuses on automobile crash worthiness statistics gathered and made public by NHTSA. He may not receive royalties or any other form of compensation for the guide. The guide deals in significant part with the programs or operations of NHTSA and, therefore, relates to the employee's official duties. On the other hand, the employee

could receive royalties from the sale of a consumer's guide to values in used automobiles even though it contains a brief, incidental discussion of automobile safety standards developed by NHTSA.

Example 4: An employee of the Securities and Exchange Commission may not receive compensation for a book which focuses specifically on the regulation of the securities industry in the United States, since that subject concerns the regulatory programs or operations of the SEC. The employee may, however, write a book about the advantages of investing in various types of securities as long as the book contains only an incidental discussion of any program or operation of the SEC.

Example 5: An employee of the Department of Commerce who works in the Department's employee relations office is an acknowledged expert in the field of Federal employee labor relations, and participates in Department negotiations with employee unions. The employee may receive compensation from a private training institute for a series of lectures which describe the decisions of the Federal Labor Relations Authority concerning unfair labor practices, provided that her lectures do not contain any significant discussion of labor relations cases handled at the Department of Commerce, or the Department's labor relations policies. Federal Labor Relations Authority decisions concerning Federal employee unfair labor practices are not a specific program or operation of the Department of Commerce and thus do not relate to the employee's official duties. However, an employee of the FLRA could not give the same presentations for compensation.

Example 6: A program analyst employed at the Environmental Protection Agency may receive royalties and other compensation for a book about the history of the environmental movement in the United States even though it contains brief references to the creation and responsibilities of the EPA. A covered noncareer em-

ployee of the EPA, however, could not receive compensation for writing the same book because it deals with the general subject matter area affected by EPA programs and operations. Neither employee could receive compensation for writing a book that focuses on specific EPA regulations or otherwise on its programs and operations.

Example 7: An attorney in private practice has been given a one year appointment as a special Government employee to serve on an advisory committee convened for the purpose of surveying and recommending modification of procurement regulations that deter small businesses from competing for Government contracts. Because his service under that appointment is not expected to exceed 60 days, the attorney may accept compensation for an article about the anticompetitive effects of certain regulatory certification requirements even though those regulations are being reviewed by the advisory committee. The regulations which are the focus of the advisory committee deliberations are not a particular matter involving specific parties. Because the information is nonpublic, he could not, however, accept compensation for an article which recounts advisory committee deliberations that took place in a meeting closed to the public in order to discuss proprietary information provided by a small business.

Example 8: A biologist who is an expert in marine life is employed for more than 60 days in a year as a special Government employee by the National Science Foundation to assist in developing a program of grants by the Foundation for the study of coral reefs. The biologist may continue to receive compensation for speaking, teaching and writing about marine life generally and coral reefs specifically. However, during the term of her appointment as a special Government employee, she may not receive compensation for an article about the NSF program she is participating in developing. Only the latter would concern a matter to which the special Government employee is assigned.

Example 9: An expert on international banking transactions has been given a one-year appointment as a special Government employee to assist in analyzing evidence in the Government's fraud prosecution of owners of a failed savings and loan association. It is anticipated that she will serve fewer than 60 days under that appointment. Nevertheless, during her appointment, the expert may not accept compensation for an article about the fraud prosecution, even though the article does not reveal nonpublic information. The prosecution is a particular matter that involves specific parties.

(ii) *Agency* has the meaning set forth in § 2635.102 (a), except that any component of a department designated as a separate agency under § 2635.203(a) shall be considered a separate agency.

(iii) *Compensation* includes any form of consideration, remuneration or income, including royalties, given for or in connection with the employee's teaching, speaking or writing activities. Unless accepted under specific statutory authority, such as 31 U.S.C. 1353, 5 U.S.C. 4111 or 7342, or an agency gift acceptance statute, it includes transportation, lodgings and meals, whether provided in kind, by purchase of a ticket, by payment in advance or by reimbursement after the expense has been incurred. It does not include:

(A) Items offered by any source that could be accepted from a prohibited source under subpart B of this part;

(B) Meals or other incidents of attendance such as waiver of attendance fees or course materials furnished as part of the event at which the teaching or speaking takes place; or

(C) Copies of books or of publications containing articles, reprints of articles, tapes of speeches, and similar items that provide a record of the teaching, speaking or writing activity.

(iv) *Receive* means that there is actual or constructive receipt of the compensation by the employee so that the employee has the right to exercise dominion and control over the compensation and to direct its subsequent use. Compensation received by an employee includes compensation which is:

(A) Paid to another person, including a charitable organization, on the basis of designation, recommendation or other specification by the employee; or

(B) Paid with the employee's knowledge and acquiescence to his parent, sibling, spouse, child, or dependent relative.

(v) *Particular matter involving specific parties* has the meaning set forth in § 2637.102(a)(7) of this chapter.

(vi) *Personal and substantial participation* has the meaning set forth in § 2635.402(b)(4).

(3) *Exception for teaching certain courses.* Notwithstanding that the activity would relate to his official duties under paragraphs (a)(2)(i) (B) or (E) of this section an employee may accept compensation for teaching a course requiring multiple presentations by the employee if the course is offered as part of:

(i) The regularly established curriculum of:

(A) An institution of higher education as defined at 20 U.S.C. 1141(a);

(B) An elementary school as defined at 20 U.S.C. 2891(8); or

(C) A secondary school as defined at 20 U.S.C. 2891(21); or

(ii) A program of education or training sponsored and funded by the Federal Government or by a State or local government which is not offered by an entity described in paragraph (a)(3)(i) of this section.

Example 1: An employee of the Cost Accounting Standards Board who teaches an advanced accounting course as part of the regular business school curriculum of an accredited university may receive compensation for teaching the course even though a substantial portion of the course deals with cost accounting principles applicable to contracts with the Government. Moreover, his receipt of a salary or other compensation for teaching this course does not violate the honorarium prohibition on receipt of compensation for any speech, which is implemented in §§ 2636.201 through 2636.205 of this chapter.

Example 2: An attorney employed by the Equal Employment Opportunity Commission may accept compensation for teaching a course at a state college on the subject of Federal employment discrimination law. The attorney could not accept compensation for teaching the same seminar as part of a continuing education program sponsored by her bar association because the subject of the course is focused on the operations or programs of the EEOC and the sponsor of the course is not an accredited educational institution.

Example 3: An employee of the National Endowment for the Humanities is invited by a private university to teach a course that is a survey of Government policies in support of artists, poets and writers. As part of his official duties, the employee administers a grant that the university has received from the NEH. The employee may not accept compensation for teaching the course because the university has interests that may be substantially affected by the performance or nonperformance of the employee's duties. Likewise, an employee may not receive compensation for any teaching that is undertaken as part of his official duties or that involves the use of nonpublic information.

(b) *Reference to official position.* An employee who is engaged in teaching, speaking or writing as outside

employment or as an outside activity shall not use or permit the use of his official title or position to identify him in connection with his teaching, speaking or writing activity or to promote any book, seminar, course, program or similar undertaking, except that:

(1) An employee may include or permit the inclusion of his title or position as one of several biographical details when such information is given to identify him in connection with his teaching, speaking or writing, provided that his title or position is given no more prominence than other significant biographical details;

(2) An employee may use, or permit the use of, his title or position in connection with an article published in a scientific or professional journal, provided that the title or position is accompanied by a reasonably prominent disclaimer satisfactory to the agency stating that the views expressed in the article do not necessarily represent the views of the agency or the United States; and

(3) An employee who is ordinarily addressed using a general term of address, such as "The Honorable," or a rank, such as a military or ambassadorial rank, may use or permit the use of that term of address or rank in connection with his teaching, speaking or writing.

NOTE: Some agencies may have policies requiring advance agency review, clearance, or approval of certain speeches, books, articles or similar products to determine whether the product contains an appropriate disclaimer, discloses nonpublic information, or otherwise complies with this section.

Example 1: A meteorologist employed with the National Oceanic and Atmospheric Administration is asked by a local university to teach a graduate course on hurricanes. The university may include the meteorologist's Government title and position together with other information about his education and previous employment in course materials setting forth biographical data on all

teachers involved in the graduate program. However, his title or position may not be used to promote the course, for example, by featuring the meteorologist's Government title, Senior Meteorologist, NOAA, in bold type under his name. In contrast, his title may be used in this manner when the meteorologist is authorized by NOAA to speak in his official capacity.

Example 2: A doctor just employed by the Centers for Disease Control has written a paper based on his earlier independent research into cell structures. Incident to the paper's publication in the Journal of the American Medical Association, the doctor may be given credit for the paper, as Dr. M. Wellbeing, Associate Director, Centers for Disease Control, provided that the article also contains a disclaimer, concurred in by the CDC, indicating that the paper is the result of the doctor's independent research and does not represent the findings of the CDC.

Example 3: An employee of the Federal Deposit Insurance Corporation has been asked to give a speech in his private capacity, without compensation, to the annual meeting of a committee of the American Bankers Association on the need for banking reform. The employee may be described in his introduction at the meeting as an employee of the Federal Deposit Insurance Corporation provided that other pertinent biographical details are mentioned as well.

[57 FR 35041, Aug. 7, 1992; 57 FR 48557, Oct. 27, 1992]

§ 2635.808 Fundraising activities.

An employee may engage in fundraising only in accordance with the restrictions in part 950 of this title on the conduct of charitable fundraising in the Federal workplace and in accordance with paragraphs (b) and (c) of this section.

(a) *Definitions.* For purposes of this section: (1) *Fundraising* means the raising of funds for a nonprofit organization, other than a political organization as defined in 26 U.S.C. 527(e), through:

(i) Solicitation of funds or sale of items; or

(ii) Participation in the conduct of an event by an employee where any portion of the cost of attendance or participation may be taken as a charitable tax deduction by a person incurring that cost.

(2) *Participation in the conduct of an event* means active and visible participation in the promotion, production, or presentation of the event and includes serving as honorary chairperson, sitting at a head table during the event, and standing in a reception line. The term does not include mere attendance at an event provided that, to the employee's knowledge, his attendance is not used by the nonprofit organization to promote the event. While the term generally includes any public speaking during the event, it does not include the delivery of an official speech as defined in paragraph (a)(3) of this section or any seating or other participation appropriate to the delivery of such a speech. Waiver of a fee for attendance at an event by a participant in the conduct of that event does not constitute a gift for purposes of subpart B of this part.

NOTE: This section does not prohibit fundraising for political parties. However, there are statutory restrictions that apply to political fundraising. Employees, other than those exempt under 5 U.S.C. 7324(d), are prohibited by the Hatch Act, 5 U.S.C. 7321 through 7328, from soliciting or collecting contributions or other funds for a partisan political purpose or in connection with a partisan election. In addition, all employees are prohibited by 18 U.S.C. 602 from knowingly soliciting contributions for any political purpose from other employees and by 18 U.S.C. 607 from soliciting such contributions in the Federal workplace.

Example 1: The Secretary of Transportation has been asked to serve as master of ceremonies for an All-Star Gala. Tickets to the event cost \$150 and are tax deductible as a charitable donation, with proceeds to be donated to a local hospital. By serving as master of ceremonies, the Secretary would be participating in fundraising.

(3) *Official speech* means a speech given by an employee in his official capacity on a subject matter that relates to his official duties, provided that the employee's agency has determined that the event at which the speech is to be given provides an appropriate forum for the dissemination of the information to be presented and provided that the employee does not request donations or other support for the nonprofit organization. Subject matter relates to an employee's official duties if it focuses specifically on the employee's official duties, on the responsibilities, programs, or operations of the employee's agency as described in § 2635.807(a)(2)(i)(E), or on matters of Administration policy on which the employee has been authorized to speak.

Example 1: The Secretary of Labor is invited to speak at a banquet honoring a distinguished labor leader, the proceeds of which will benefit a nonprofit organization that assists homeless families. She devotes a major portion of her speech to the Administration's Points of Light initiative, an effort to encourage citizens to volunteer their time to help solve serious social problems. Because she is authorized to speak on Administration policy, her remarks at the banquet are an official speech. However, the Secretary would be engaged in fundraising if she were to conclude her official speech with a request for donations to the nonprofit organization.

Example 2: A charitable organization is sponsoring a two-day tennis tournament at a country club in the Washington, DC area to raise funds for recreational programs for learning disabled children. The organization has in-

vited the Secretary of Education to give a speech on federally funded special education programs at the awards dinner to be held at the conclusion of the tournament and a determination has been made that the dinner is a appropriate forum for the particular speech. The Secretary may speak at the dinner and, under § 2635.204(g)(1), he may partake of the meal provided to him at the dinner.

(4) *Personally solicit* means to request or otherwise encourage donations or other support either through person-to-person contact or through the use of one's name or identity in correspondence or by permitting its use by others. It does not include the solicitation of funds through the media or through either oral remarks, or the contemporaneous dispatch of like items of mass-produced correspondence, if such remarks or correspondence are addressed to a group consisting of many persons, unless it is known to the employee that the solicitation is targeted at subordinates or at persons who are prohibited sources within the meaning of § 2635.203(d). It does not include behind-the-scenes assistance in the solicitation of funds, such as drafting correspondence, stuffing envelopes, or accounting for contributions.

Example 1: An employee of the Department of Energy who signs a letter soliciting funds for a local private school does not "personally solicit" funds when 500 copies of the letter, which makes no mention of his DOE position and title, are mailed to members of the local community, even though some individuals who are employed by Department of Energy contractors may receive the letter.

(b) *Fundraising in an official capacity.* An employee may participate in fundraising in an official capacity if, in accordance with a statute, Executive order, regulation or otherwise as determined by the agency, he is authorized to engage in the fundraising activity as part of his official duties. When authorized to participate in an official

capacity, an employee may use his official title, position and authority.

Example 1: Because participation in his official capacity is authorized under part 950 of this title, the Secretary of the Army may sign a memorandum to all Army personnel encouraging them to donate to the Combined Federal Campaign.

(c) *Fundraising in a personal capacity.* An employee may engage in fundraising in his personal capacity provided that he does not:

(1) Personally solicit funds or other support from a subordinate or from any person:

(i) Known to the employee, if the employee is other than a special Government employee, to be a prohibited source within the meaning of § 2635.203(d); or

(ii) Known to the employee, if the employee is a special Government employee, to be a prohibited source within the meaning of § 2635.203(d)(4) that is a person whose interests may be substantially affected by performance or nonperformance of his official duties;

(2) Use or permit the use of his official title, position or any authority associated with his public office to further the fundraising effort, except that an employee who is ordinarily addressed using a general term of address, such as "The Honorable," or a rank, such as a military or ambassadorial rank, may use or permit the use of that term of address or rank for such purposes; or

(3) Engage in any action that would otherwise violate this part.

Example 1: A nonprofit organization is sponsoring a golf tournament to raise funds for underprivileged children. The Secretary of the Navy may not enter the tournament with the understanding that the organization intends to attract participants by offering other entrants the opportunity, in exchange for a donation in the form

of an entry fee, to spend the day playing 18 holes of golf in a foursome with the Secretary of the Navy.

Example 2: An employee of the Merit Systems Protection Board may not use the agency's photocopier to reproduce fundraising literature for her son's private school. Such use of the photocopier would violate the standards at § 2635.704 regarding use of Government property.

Example 3: An Assistant Attorney General may not sign a letter soliciting funds for a homeless shelter as "John Doe, Assistant Attorney General." He also may not sign a letter with just his signature, "John Doe," soliciting funds from a prohibited source, unless the letter is one of many identical, mass-produced letters addressed to a large group where the solicitation is not known to him to be targeted at persons who are either prohibited sources or subordinates.

[57 FR 35041, Aug. 7, 1992; 57 FR 48557, Oct. 27, 1992]

§ 2635.809 Just financial obligations.

Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those such as Federal, State, or local taxes that are imposed by law. For purposes of this section, a just financial obligation includes any financial obligation acknowledged by the employee or reduced to judgment by a court. In good faith means an honest intention to fulfill any just financial obligation in a timely manner. In the event of a dispute between an employee and an alleged creditor, this section does not require an agency to determine the validity or amount of the disputed debt or to collect a debt on the alleged creditor's behalf.

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Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**BRIEF OF AMICUS CURIAE COMMON CAUSE
IN SUPPORT OF PETITIONERS**

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March 24, 1994

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1170

UNITED STATES OF AMERICA, *et al.*,
Petitioners,
v.

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**BRIEF OF AMICUS CURIAE COMMON CAUSE
IN SUPPORT OF PETITIONERS**

INTEREST OF AMICUS CURIAE¹

Common Cause files this brief in support of the United States' Petition for a Writ of Certiorari. Common Cause is a non-profit membership corporation organized under the laws of the District of Columbia. Its principal objective is to further honest and responsible government in the United States. It currently represents the interests of 280,000 members.

Common Cause has a longstanding interest in the federal laws concerning government ethics, and it actively supported the enactment of the Ethics Reform Act of 1989. Representatives of Common Cause testified before

¹ All parties to this case have consented to the filing of this brief. The written consents of the parties are attached as Appendix B.

the commissions appointed to investigate the reform of the ethics laws and before the relevant committees of Congress during their consideration of the 1989 legislation.

REASONS FOR GRANTING THE WRIT

The honoraria provision struck down by the Court of Appeals is an integral part of the web of ethics regulations governing the conduct and pay of federal employees. The ban on the receipt of honoraria for articles, speeches or appearances was the culmination of two decades of Congressional revisions and refinements of the honoraria laws in particular and the ethics law in general. The Court of Appeals decision, if permitted to stand, undermines the ability of Congress to enact significant ethics legislation governing the federal service.

Title VI of the Ethics Reform Act as amended ("the Act") prohibits the receipt of honoraria for any appearance, speech or article by any Member, officer, or employee of the United States government. The Act does not prohibit any federal official from making a speech, appearance or publishing an article.² It provides only that a federal employee may not receive payment for such activities, except reimbursement for travel expenses. 5 U.S.C. app. § 505(3) (Supp. IV 1992).

The honoraria provision was not, as has been suggested by the Respondents and echoed in the opinion of the Court of Appeals, a chance and purposeless addition to the laws. Rather, it was part of a careful step-by-step effort of Congress to protect against corruption and to ensure the appearance as well as the reality of impartiality in the federal government.

² Pub. L. No. 101-194, § 601(a), 103 Stat. 1760 (1989), 5 U.S.C. app. § 501(b) (Supp. IV 1992). The honoraria provisions of the 1989 Act did not originally cover the Senate and its employees. Subsequent legislation extended the honoraria ban to all government employees, including Senators and their staff. Pub. L. No. 102-90, 105 Stat. 447, 450 (1991).

Congress has long recognized that employees at all levels of government can harm the public interest if they are subject to improper financial influence. Since the 19th century, conflict-of-interest statutes have prohibited all government employees from acting for the government in business transactions in which they have a financial interest. As this Court recognized,

The moral principle upon which the statute is based has its foundation in the Biblical admonition that no man may serve two masters, Matt. 6:24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest. Consonant with this salutary moral purpose, Congress has drafted a statute which speaks in very comprehensive terms. Section 434 is not limited in its application to those in the highest echelons of government service . . .³

Similarly, all executive branch officers and employees have long been subject to the prohibitions against private compensation for government service and against bribery, graft, and representation of private parties in matters affecting the government.⁴

As part of these general prohibitions regulating the conduct of executive branch employees, federal regulations have long set forth general restrictions on the receipt of honoraria by executive branch employees. Under these regulations, executive branch employees could not receive honoraria for speeches or articles that focus specifically on the employing agency's policies, create a conflict of interest, or interfere with the employee's official

³ *United States v. Mississippi Valley Gathering Co.*, 364 U.S. 520, 549 (1961) (construing 18 U.S.C. § 434, a predecessor of 18 U.S.C. § 208 (1988), which applied to any "officer or agent of the United States").

⁴ See S. Rep. No. 2213, 87th Cong., 2d Sess. (1962), reprinted in 1962 U.S.C.C.A.N. 3852, 3856-58 (discussing 18 U.S.C. §§ 201, 203, 205, 209 and their predecessor statutes).

duties. These prohibitions, extending back decades, applied to all executive branch employees, regardless of grade or pay.⁵

Thus, when in the wake of the Watergate era scandals Congress began the task of erecting prohibitions against the receipt of honoraria, it began its task against the backdrop of public corruption laws that were applied uniformly throughout the federal executive service. When Congress enacted in 1974 the first statutory limitations on the receipt of honoraria for an article, speech or appearance, it not surprisingly chose to apply the restrictions to every "elected or appointed officer or employee of any branch of the Federal Government." Under this law, the amount of honorarium was limited to \$1,000 (excluding reimbursement for actual travel expenses), with an aggregate limit of \$15,000 in any calendar year.⁶ However, it departed from the prior regulations on one crucial point. Unlike the regulations, which were limited in scope by a subject matter test, the honoraria statutes applied to all speeches, articles or appearances without reference to the relationship between the subject matter and the official's duties.

Two years later, the honoraria limits were raised to \$2,000 per speech and \$25,000 per year, and civil rather than criminal penalties were proscribed, but the restrictions continued to apply to government employees at all levels in all three branches and to all speeches, articles or appearances regardless of the subject matter or the identity or interests of the audience.⁷

⁵ See 33 Fed. Reg. 12,487 (1968); 5 C.F.R. § 735 (1992).

⁶ See Pub. L. No. 93-443, § 101(f)(1), 88 Stat. 1268 (1974).

⁷ These monetary ceilings are no longer in effect. The initial \$25,000 limit was eventually lowered by Congress to \$2,000 by 1981. See Pub. L. No. 97-51, 95 Stat. 958, 966 (1981). The \$2,000 limit on honoraria was repealed by legislation imposing a complete ban on honoraria at issue in this case. See Pub. L. No. 101-194, § 601(a), 103 Stat. 1760 (1989) (conforming amendments) (execu-

The problems caused by the receipt of honoraria for articles, speeches and appearances were described in reports of special ethics panels in the House and Senate in 1977, which recommended the adoption of even tighter restrictions for members of Congress. Both panels recognized that polls and public surveys showed rising public cynicism over the practice of honoraria, and noted the inherent potential for conflicts of interest. The House adopted, as an internal rule applicable to House Members, a \$750 limit on honoraria for any single speech, an annual limit on outside earned income, and regulations concerning travel expenses. The Senate adopted similar restrictions.⁸

This patchwork of statutes, regulations, and legislative rules proved insufficient to curtail the abuses created by outside income and to promote public confidence in the integrity of government. In 1989, President Bush recognized the continuing problem in the executive branch and provided a partial remedy, an executive order prohibiting all presidential appointees in the executive branch from receiving any outside earned income (including any honoraria).⁹ In the legislative branch, the limits on honoraria also proved inadequate. Honoraria received by members of the House and Senate fueled the public perception that special interests were engaging in

tive and judicial branches and House of Representatives); Pub. L. No. 102-90, 105 Stat. 447, 450 (1991) (Senate). Thus, in light of the judgment of the Court of Appeals, currently there are no statutory limits on the amount of honoraria that a member of the executive branch can accept.

⁸ *Financial Ethics: Communication from the Chairman, House Comm. on Admin. Review*, H.R. Doc. No. 73, 95th Cong., 1st Sess. 9-12 (1977); *Senate Code of Official Conduct: Report of the Special Comm. on Official Conduct*, S. Rep. No. 49, 95th Cong., 1st Sess. 8-9, 37-40 (1977). The Senate rule was never implemented, leaving the Senate covered by statutory limits. The House rule was later revised.

⁹ See Exec. Order No. 12,674 (1989), 3 C.F.R. at 215 (1990).

influence-peddling. Sizeable honoraria for Congressional staff members also created the appearance of impropriety in the operations of the government. For instance, the press gave widespread coverage to honoraria received by staffers—including \$28,000 in honoraria pocketed during a two-day barnstorming trip to Oklahoma and Texas by the top staff aides to House speaker Jim Wright and minority leader Robert Michel.¹⁰

Newspaper articles and editorials across the country reflected the public view of honoraria as “legalized bribery,” “legislative prostitution,” “shameless pandering to special-interest payoffs,” “bag money,” “lobbyist payola,” “appalling,” a “disgrace” and a “low-life practice.”¹¹ Against this background, Congress began again the task of overhauling the honoraria laws.

To assist in this effort, Congress and the President appointed a series of blue-ribbon panels to study ethics law reform. After taking extensive testimony, each of those panels specifically recommended a complete ban on the receipt of all honoraria by all government personnel. The Quadrennial Commission concluded that the “potential for impropriety in the present rules governing honoraria

¹⁰ See Richard Stengel, *Morality Among the Supply-Siders*, Time, May 25, 1987, at 18 (listing ethical lapses by Administration officials, including improper payments from private parties); Charles R. Babcock, *For Two in the House, A Fast \$28,000 in Fees*, Washington Post, Oct. 6, 1989, at A20; see also John E. Yang, *Honoraria, Bounty of Special Interest Groups, Trickle Down to Some Congressional Staffers*, Wall St. J., May 26, 1989, at A12; Charles R. Babcock, *Interest-Group Honoraria Plentiful for Top Hill Aides*, Washington Post, Oct. 6, 1989, at A1; Carol Matlack, *Gravy Train*, Nat'l J., Jan. 28, 1989; Dan Vukelich, *Honorarium Ban Would Hit Hill Staff, Officers in Wallett*, Washington Times, Feb. 7, 1989; Kimberly Mattingly, *Staff Plays Honoraria Game Too*, Roll Call, Jan. 22, 1989.

¹¹ Quoted in *Report of 1989 Comm'n on Executive, Legislative, and Judicial Salaries: Hearings before the Senate Comm. on Governmental Affairs*, 101st Cong., 1st Sess. 30, 32 (1989) (statement of Fred Wertheimer, President of Common Cause).

was so high that the practice of receiving honoraria should be eliminated.” It “strongly recommend[ed] that the practice of accepting honoraria in all three branches be terminated by statute . . .”¹² Similarly, the President’s Commission on Federal Ethics Law Reform urged that Congress should “ban the receipt of honoraria by all officials and employees in all three branches of government.”¹³ The President’s Commission concluded that honoraria restrictions limited by a relational test to the official’s duties would be insufficient to resolve the problems because of the risk of circumvention (“[t]o curtail the risk that individuals will find a way to circumvent these restrictions, the bar on honoraria necessarily needs to extend both to activities related to an individual’s official duties and to other activities”).¹⁴

Finally, the 14 members of the House Bipartisan Task Force on Ethics asserted that “. . . honoraria [should] be abolished for *all officers and employees of the government* . . .”¹⁵ In language echoing that of the President’s Commission, the Bipartisan Task Force warned against “circumvent[ation]” of the rules and advocated that the honoraria ban extend to topics both related and unrelated to the official’s duties.

The panels’ recommendations reflected a number of important and interrelated judgments. First, the panels affirmed that the receipt of honoraria for articles, speeches

¹² *Fairness For Our Public Servants: The Report of the 1989 Commission on Executive, Legislative and Judicial Salaries* (Dec. 1988) (hereinafter *Quadrennial Commission Report*).

¹³ *To Serve With Honor: Report of the President’s Commission on Federal Ethics Law Reform* (hereinafter *Ethics Commission Report*) 35-36 (March 1989).

¹⁴ *Ethics Commission Report* (1989), Recommendation 6, and discussion at 35-37.

¹⁵ *Report of the House Bipartisan Task Force on Ethics on H.R. 3660*, 101st Cong., 1st Sess. 14 (Comm. Print 1989) (emphasis added).

and appearances undermined public confidence in fair government and created an appearance of impropriety, if not actual impropriety itself. Second, the various reports, especially that of the President's Commission, explained that there existed an extreme and unacceptable lack of uniformity across the branches of government with respect to the honoraria laws and that the laws and rules applicable to the Legislative Branch were far too lax.¹⁶ The panels concluded that if the prohibition against the receipt of honoraria was to be successfully applied to the Legislative Branch, as they all believed it had to be, then an equally rigorous ban would also have to be applied consistently to all three branches. This conclusion was based on considerations of fairness and of political practicality. Third, they determined that the potential for abuse—although differing in degree—existed at all levels of government employment, from the highest to the lowest. Fourth, the panels, recognizing the historical antecedents of the honoraria rules, limited the reach of their proposed rules to articles, speeches, and appearances on the belief that the restrictions should be limited to the perceived problem. Finally, the commissions concluded that a broad prophylactic ban applicable both to related and unrelated topics was necessary to curtail the risk that honoraria payers and government employees would circumvent the rules and that agencies would apply subjective rules in an uneven fashion. See, e.g., *Ethics Commission Report* at 34 (describing "eclectic" set of rules among executive agencies).

These recommendations served as the basis for Congress' decision to adopt the honoraria ban.¹⁷ Upon sign-

¹⁶ *Ethics Commission Report* at 35-36.

¹⁷ See Statement on Signing the Ethics Reform Act of 1989, 25 Weekly Comp. Pres. Doc. 1855 (Nov. 30, 1989) (the Act "is based on . . . the recommendations of the President's Commission on Federal Ethics Law Reform, and the report of the House Bipartisan Ethics Task Force."); 135 Cong. Rec. H8747-48 (daily ed. Nov. 16, 1989) (remarks of Rep. Lynn Martin, co-chair of House Bipartisan Task

ing the 1989 Act, President Bush praised the statute as containing "important reforms that strengthen Federal ethical standards" and described the honoraria ban for federal employees as one of the "[k]ey reforms in the Act."¹⁸

The Court of Appeals erred in three significant respects. First, the Court of Appeals departed from the holdings of this Court as to the power and authority of the government in its role as employer. In regulating the terms and conditions of government employment for employment-related reasons, Congress exercises authority over expressive activities that it cannot wield in other contexts. "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); see *Connick v. Myers*, 461 U.S. 138, 140 (1983); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980). The broad authority of Congress to regulate the conduct of federal employees is best illustrated in the cases upholding the constitutionality of the Hatch Act. *United States Civil Service Commission v. National Ass'n of Letter Carriers ("CSC")*, 413 U.S. 548 (1973); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). In *CSC*, 413 U.S. at 564, the Court recognized that Congress faces a range of policy choices regarding permissible activities by government employees, and that it is within Congress' discretion to choose among competing alternatives. No subsequent decision of this Court has supplanted the balancing test set forth in *Pickering*.

The Court of Appeals failed to apply the *Pickering* balance test to the honoraria provision. The Court did

Force) ("a good part of [the bill] is based on the recommendations of the President's ethics commission").

¹⁸ Statement on Signing the Ethics Reform Act of 1989, *supra* note 17.

recognize that "the government has a strong interest in protecting the integrity and efficiency of public service and in avoiding even the appearance of impropriety created by abuse of the practice of receiving honoraria." Indeed, the Court found it could "safely assume . . . that the interest in avoiding the appearance of impropriety is strong enough to outweigh government employees' interest in engaging in speech for compensation *where the compensation creates such an appearance.* . . ." Appendix to Brief of Solicitor General at 6a (emphasis in original). Nevertheless, the Court struck down the honoraria ban as over-inclusive—because the statute does not require a nexus between the employee's job and the subject matter of character of the payor—despite its view that in many of its applications, the honoraria ban may be constitutional under the *Pickering* balance test. *Id.* at 6a. This departure from the teachings of *Pickering* imperils the federal government's ability to act reasonably as an employer—distinct from its role as the state—and impose reasonable conditions of employment.¹⁹

Second, the Court of Appeals failed to give adequate deference to the judgments of Congress. The Commissions on which Congress relied, described above, unanimously concluded after careful deliberation that the government's interest in guarding against the appearance of

¹⁹ The Court of Appeals recognized that Section 501(b) only regulates the financial consequences of speeches, articles or appearances, rather than the speech itself. App. to Brief of Solicitor General at 6a. While restrictions on financial incentives may implicate some First Amendment concerns under *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991), the character and effect of the restriction is relevant to the *Pickering* balancing test. Here, not only are government employees permitted to speak and write but they are also entitled to reasonable travel expenses, and it is clear, the honoraria ban notwithstanding, that government employees, including the Plaintiffs, have continued to speak and write on matters of public concern. See, e.g., Peter G. Crane, *Let My People Write*, Washington Post (February 8, 1994) at A19.

impropriety as well as actual impropriety warranted a uniform ban. This judgment reflected the shared belief that (1) no artificial grade distinction provided an adequate cleavage between those who wielded discretionary authority and those who did not; (2) regulations implementing nexus tests (as advocated by the Court of Appeals) were subject to subjective and inadequate enforcement and to intentional circumvention by federal employees²⁰; and (3) the significant public concern with the fair and evenhanded operation of government warranted a prophylactic rule to guard against future conflict.

In light of these findings, Congress reasonably concluded that a subjective case-by-case review of honoraria payments would not protect the public interest as well as a comprehensive prohibition on honoraria. Prior to implementation of the honoraria ban, the enforcement of executive branch regulations depended on vague, subjective judgments at the agency level and, to a substantial extent, on self-policing by individual government employees with a financial stake in non-enforcement. To be sure, Congress could have rejected the conclusions of the Commissions and instead adopted a more limited statute. It did not, however, and this judgment as to the need for strong medicine is entitled to significant deference. See *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197, 210 (1982) ("Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.").

Indeed, this Court has repeatedly upheld far-reaching statutory restrictions designed to promote the integrity and efficiency of the public service. *Mitchell*, 330 U.S. at 101 & n.37; *CSC*, 413 U.S. at 566 n.12. The existence of numerous state and local government regulations that limit "moonlighting" by government employees suggests

²⁰ *Ethics Commission Report* at 36.

strongly that lesser restrictions such as the prohibition against honoraria do not rise to the constitutional level that Respondents in this case have claimed. *See, e.g., Gosney v. Sonora Independent School District*, 603 F.2d 522, 527-8 (5th Cir. 1979) (uniform prohibition on outside employment); *Hayes v. Civil Service Commission*, 108 N.E.2d 505 (Ill. 1952) (ban on all outside employment by government employee).

Third, the Court of Appeals failed to recognize that the reasonableness of this legislative judgment has been borne out in a number of important ways since passage of the honoraria ban. For instance, the report of the General Accounting Office ("GAO Report") catalogues the difficulty that federal agencies have encountered in enforcing the subjective and varied ethics regulations in effect prior to the enactment of the honoraria ban. The report, entitled *Employee Conduct Standards: Some Outside Activities Present Conflict-of-Interest Issues*, presents the results of a GAO study of federal employees' work-related activities outside the scope of their employment, and the possible conflicts of interest that may result from those activities.²¹

The study specifically addresses the adequacy of agency controls over federal employees' outside activities, including controls on speaking and writing prior to the effective date of the honoraria ban. Based on its investigation of eleven selected agencies, the GAO found that speaking and consulting were the most frequently approved outside activities. In direct contradiction to Respondents' repeated assertions that existing conflict of interest regulations were adequate, the GAO Report concludes the "[s]ome agen-

²¹ U.S. General Accounting Office, Report to the Chair, Subcommittee on Federal Services, Post Office and Civil Service Committee on Governmental Affairs, U.S. Senate, *Employee Conduct Standards: Some Outside Activities Present Conflict-of-Interest Issues* (released to Congress in February 1992; released to public on March 30, 1992) (attached as Appendix A, without appendices).

cies did not monitor employees' activities outside of the government to the extent needed to ensure that violations of related laws and regulations were avoided." GAO Report at 3a. Indeed, the GAO Report notes that "[b]ecause of overly permissive approval policies, five agencies approved some outside activities, such as speaking and consulting, that appeared to violate the standard of conduct prohibiting the use of public office for private gain. These activities preceded the January 1991 ban by Congress on the acceptance of honoraria (compensation) by most federal employees for outside speeches, articles, and appearances." GAO Report at 3a.

Moreover, the GAO Report points to the uneven nature of enforcement of existing conflict-of-interest regulations. "Standard-of-conduct regulations and procedures for monitoring employees' outside activities varied widely among the 11 agencies. Some agencies did not monitor employees' activities outside the government to an extent adequate to ensure that violations of related laws and regulations were avoided." GAO Report at 9a.²²

The uneven enforcement of the executive branch regulations identified in the GAO Report engendered a system of perceived and actual unfairness and abuses that seriously threatened the legitimacy of government

²² In addition, GAO made the following specific findings:

Most agencies did not periodically update their approvals of employees' outside activities that were to continue over several years even though employees duties could change over this time to create a conflict of interest. GAO Report at 10a.

Some agencies did not require by regulation that employees provide some information that [GAO] believe[s] was necessary for determining whether conflict-of-interest and standard-of-conduct requirements were met. GAO Report at 11a.

[S]ix agencies did not require employees to show the amount of compensation they expected to receive from outside activities . . . [Thus], the agencies could not determine whether [the] employees [complied with the \$2000 limit] on compensation from outside activities. GAO Report at 11a.

conflict-of-interest regulations. Against this backdrop of uneven enforcement, Congress' judgment that a broad prophylactic ban was necessary to curb the actual and potential abuses of honoraria is reasonable.

In addition, the activities of the Respondents themselves (many of whom have important discretionary functions despite their self-description as low-level employees) raise substantial questions about the enforcement of subjective regulations. For instance, the agricultural editor for the Voice of America complains that the honoraria ban unfairly prohibited him from speaking for payment before a gathering of representatives of agricultural groups at a conference in Rome. The fact that these agricultural groups have a substantial interest in the contents of his VOA reports apparently did not raise questions of conflict of interest either for him or for his agency. Similarly, the business editor at the VOA, also a party to this litigation, has written articles on a free-lance basis for organizations such as American Express and the U.S. Chamber of Commerce, despite the fact that these organizations have a decided interest in the manner in which economic and business news is reported. The judgment of Congress and the Commissions that subjective regulations and self-policing by those with interest in nonenforcement are inadequate is clearly borne out on the facts of this case.

CONCLUSION

It may well be that Congress could have drafted a more narrowly tailored law, one that distinguished among the three branches, among different levels of government employees, and among different types of activity for which honoraria are paid. But Congress had the right to conclude, as it did, that such distinctions would have been difficult to enforce, and would have left room for evasions that would create the reality or appearance of favoritism. The Constitution does not forbid the Congress from deciding in favor of a blanket and uniform ban. For the reasons stated above, the Court should grant the writ of certiorari.

Respectfully submitted,

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March 24, 1994

APPENDICES

1a

APPENDIX A

United States General Accounting Office

GAO

Report to the Chairman, Subcommittee
on Federal Services, Post Office and
Civil Service, Committee on Govern-
mental Affairs, U.S. Senate

February 1992

**EMPLOYEE CONDUCT
STANDARDS**

Some Outside Activities Present
Conflict-of-Interest Issues

[SEAL]

GAO United States
General Accounting Office
Washington, D.C. 20548

General Government Division

B-245739

February 10, 1992

The Honorable David Pryor
Chairman, Subcommittee on Federal
Services, Post Office and Civil Service
Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

Your April 30, 1990, letter raised questions about federal employees' work-related activities outside the government. You were troubled that conflicts of interest may result when federal employees do similar work both inside and outside government. In response to your questions and concerns, this report presents information we obtained at selected agencies¹ on

- the extent and characteristics of employees' approved activities outside the federal government,

¹ As agreed with the Subcommittee, we included the following 11 agencies in our review: the National Institute of Science and Technology (NIST); the Small Business Administration (SBA); the Office of U.S. Trade Representative (USTR); the Merit Systems Protection Board (MSPB); the Office of Personnel Management (OPM); the Nuclear Regulatory Commission (NRC); the Securities and Exchange Commission (SEC); the Environmental Protection Agency (EPA); the Food and Drug Administration (FDA); the Centers for Disease Control (CDC); and the National Institutes of Health (NIH).

- agency regulations and procedures for monitoring these outside activities, and
- approved activities that could create the appearance of conflict of interest.

As agreed with the Subcommittee, we also determined whether the Office of Government Ethics (OGE) had (1) provided guidance to agencies on approving and monitoring employees' outside activities and (2) reviewed agency controls over such activities.

Results in Brief

The extent of approved outside activities varied among the 11 agencies. Speaking and consulting were the most frequently approved outside activities.

Some agencies did not monitor employees' activities outside of the government to the extent needed to ensure that violations of related laws and regulations were avoided. For example, most agencies did not require employees to update their approvals, even though in some instances the outside activities were to occur over several years. OGE audited most of the 11 agencies' controls over outside activities and recommended improvements. However, agencies did not always implement OGE's recommendations. Subsequently, OGE took steps to improve agency compliance with OGE recommendations.

Because of overly permissive approval policies, five agencies approved some outside activities, such as speaking and consulting, that appeared to violate the standard of conduct prohibiting the use of public office for private gain. These activities preceded the January 1991 ban by Congress on the acceptance of honoraria (compensation) by most federal employees for outside speeches, articles, and appearances. The ban applies whether or not the activity relates to government work. Congress is considering pro-

posals to apply the ban only to the above activities when they focus specifically on government work. Such a change would allow employees to again receive honoraria under some conditions now prohibited. It would also continue the prohibition on accepting compensation for certain outside activities that we question because of their close relationship to agency responsibilities.

In July 1991, OGE proposed new standards of conduct for all executive branch employees. OGE's proposed standards allow agencies to establish, when desirable, requirements for prior approval of employees' outside activities. We believe OGE needs to strengthen its standards on agency approval of outside activities. Prior review of certain kinds of outside activities, e.g., those related to the agency's responsibilities, can help agencies and employees avoid conflicts of interest. In addition, OGE needs to provide agencies with guidance on dealing with situations in which employees are to receive compensation for consulting activities that are closely related to agency responsibilities. OGE agreed to implement all of our recommendations.

Background

Since 1965, executive orders and implementing regulations have prohibited employees from engaging in outside activities that are not compatible with the full and proper discharge of the duties and responsibilities of their government employment. The prohibition includes activities that involve the acceptance of a fee or anything of value in circumstances in which acceptance may result in or create the appearance of a conflict of interest or that may result in the appearance of using public office for private gain. Further, officers and employees may not use information gained by virtue of their government employment that is not generally available to the

public, nor can they use government time, equipment, or facilities to carry out private activities.

Executive branch standard-of-conduct regulations issued in 1968 and administered by OGE contain specific guidance and requirements on employees' outside activities. Under those regulations, executive branch agencies were required to issue standard-of-conduct regulations applicable to the agency's particular functions and activities. Additionally, OGE issued advisory guidance on approving employees' outside activities, such as making paid speeches at privately sponsored seminars.

In April 1989, President Bush issued Executive Order 12674, which includes the principles of ethical conduct of government officers and employees. These principles supersede those on which the 1968 regulations were based. As authorized by that order, in July 1991, OGE published proposed employee conduct regulations that included new guidance on employees' outside activities.

An honoraria ban effective January 1, 1991, mandated by the Ethics Reform Act of 1989, prohibits most federal employees from accepting money or anything of value for a speech, article, or appearance, whether or not these activities relate to government work. Bills have been introduced in Congress to modify the honoraria ban to limit its application to activities that focus specifically on the employing agency's responsibilities, policies, or programs.

Until January 1, 1991, and for the period covered by our review, the test for acceptance of honoraria by employees except for highest level officials, who were subject to additional restrictions, included the following five questions.

1. Is the honorarium offered for carrying out government duties or for an activity that focuses specifi-

cally on the employing agency's responsibilities, policies, and programs?

2. Is the honorarium offered because of the official position held by the employee?
3. Is the honorarium offered because of the government information that is being imparted?
4. Is the honorarium offered by someone who does business with or wishes to do business with the employee in his or her official capacity?
5. Were any government resources or time used by the employee to produce the materials for the articles or speech or make the appearance?

If the answer to all of these questions was no, then an offered honorarium was acceptable, although under 2 U.S.C. 441i(a) it could not have exceeded \$2,000. (See app. II for additional information on prohibitions and requirements on employees' activities outside the federal government.)

Approach

Our approach to reviewing employees' outside activities at all 11 agencies was to obtain data on employees who had been approved for outside activities at any time during fiscal years 1988 through 1990. For a universe of these employees at some agencies and a sample of employees at other agencies, we collected information on the employee (e.g., federal occupation and grade level), the type of approved outside activity (e.g., teaching, selling, consulting), and whether the employee was to be compensated. We compared approved outside activities with criteria in applicable laws, executive orders, regulations, and OGE guidance to see if the activities might create the appearance of a violation of standard-of-conduct regulations and/or conflict-of-interest statutes.

To determine how the 11 agencies monitored outside activities, we compared their regulations and practices with related federal statutes and government-wide regulations. We reviewed their procedures and criteria for approving employees' requests to do outside activities. We also reviewed the results of Office of Inspector General's investigations done at 7 of the 11 agencies on employees' outside activities.

We assessed OGE's guidance and oversight of outside employment by reviewing its regulations, guidance, and audit reports and determining the extent to which OGE addressed outside employment in these documents. Appendix I provides additional information on the objectives, scope, and methodology of our review, including details on our sampling procedures.

Extent and Characteristics of Employees' Approved Outside Activities

As seen in table 1, the data we gathered showed that the number of employees who were approved for outside activities ranged from less than 1 percent, for OPM headquarters employees, up to 11 percent, for FDA employees.

Table 1: Employees With Approved Outside Activities

With Agency	Total employees as of October 1990	Employees with approved activities ^a	
		Number	Percent
NIST	3,061	105	3
SBA ^b	3,931	143	4
USTR	154	1	1
MSPB	307	5	2
OPM ^c	3,680	3	^d
NRC	3,130	24	1
SEC	2,271	38	2
EPA-OPTS ^e	1,308	44	3
FDA	8,614	988	11
CDC	5,462	301	6
NIH	16,181	826	5

^a Data for all agencies, except NIH, are approvals during fiscal years 1988 through 1990 for NIH, we limited our review primarily to fiscal year 1990 approvals.

^b SBA approval data excluded certain types of outside activities such as "routine" or "noncontroversial" requests from employees at grade 12 and below that were approved by SBA regional offices.

^c All OPM data are for headquarters employees only. Our review at OPM did not disclose any approvals of outside activities for OPM employees. Subsequently, OPM identified three employees who were to engage in outside activities.

^d Less than 1 percent.

^e Because overall EPA approval data were not available, we limited our review primarily to EPA's Office of Pesticides and Toxic Substances (OPTS).

As indicated in table 1, NIH, FDA, and CDC approved the largest number of outside activities. However, differences in the percentages of employees with approved activities in the 11 agencies may be due, in part, to varying approval requirements.

Employees approved for outside activities came from a variety of federal occupations. Some occupations were more predominant than others. For example,

medical officers accounted for 32 percent and 41 percent of all approved outside activities at CDC and NIH, respectively. Most of the employees receiving approval for outside activities were at grades 13 and above. Outside speaking and consulting were common among most of the 11 agencies and accounted for the vast majority of the activities, approved by 5 agencies—NIH, CDC, FDA, NIST, and FDA. Most of the employees at each agency (from about 60 to 100 percent) either were to be paid for their outside activities or were to do activities for which they customarily would be paid, such as working as a retail sales clerk.

Agency Procedures for Monitoring Outside Activities Varied Widely

Standard-of-conduct regulations and procedures for monitoring employees' outside activities varied widely among the 11 agencies. Some agencies did not monitor employees' activities outside the government to an extent adequate to ensure that violations of related laws and regulations were avoided.

All 11 agencies prohibited employees from doing certain work-related activities outside the agencies. However, the prohibitions varied in scope and specificity. For example, SEC prohibited employees from holding any outside job associated with the financial securities markets. In contrast, NRC did not prohibit outright any specific nuclear industry-related outside activities. Rather, along with some general prohibitions, NRC identified certain activities that it said could be incompatible with government employment. This included accepting employment or anything of value from certain NRC-related organizations, such as contractors, licensees, and applicants for NRC licenses. NRC employees were not

to engage in these types of activities unless receiving NRC authorization.

All 11 agencies also required employees to obtain approval of some types of outside activities. Employees' immediate supervisors at all agencies had a role in reviewing outside activities. These supervisors were to either provide information to approving officials (at 1 agency) or recommend approval or disapproval to approving officials (at 10 agencies).

Beyond these basic approval requirements, we found little consistency in the restrictions on employees' outside activities or agency approval requirements. Four agencies (SBA, USTR, SEC, and FDA) required all employees to obtain approval of work-related outside activities. The other seven agencies had less comprehensive approval requirements. For example, MSPB allowed its employees to determine when approval of their outside activities should be obtained. NIS limited its requirements to teaching, lecturing, writing, counseling, and other outside technical and professional activities. In addition, under Commerce regulations, NIST employees were required to obtain departmental authorization for employment with foreign entities.

Most agencies did not periodically update their approvals of employees' outside activities that were to continue over several years even though employees' duties with the federal agency or the outside organization, or both, could change over this time to create conflicts of interest or other ethics problems. Annual financial disclosure reports provided information on employees' outside activities, but not all agencies used these reports to monitor the approval of such activities. Specifically, ethics officials in two agencies (SEC and USTR) said they did not use the reports to determine if supervisory approval was obtained when required.

Some agencies did not require by regulation that employees provide some information that we believe was necessary for determining whether conflict-of-interest and standard-of-conduct requirements were met. Agency officials may have at times requested employees to supply additional information. However, on the basis of our review, we found that some information essential for informed decisions was not obtained.

For example, six agencies (NIST, USTR, OPM, NRC, FDA, and CDC) did not require employees to show the amount of compensation they expected to receive from outside activities. Three agencies (NIST, USTR, and OPM) did not require employees to identify the names of outside employers. By not requiring this information, the agencies could not determine whether (1) employees met legal and regulatory restrictions on compensation from outside activities (e.g., the \$2,000 honorarium limit in 2 U.S.C. 441i(a) that applied before the ban) and (2) outside employers had financial relationships that could create a conflict of interest.

Some Outside Activities Presented Conflict-of-Interest Issues

Nine of the 11 agencies approved outside activities that presented issues involving potential violations of conflict-of-interest statutes and/or standard-of-conduct regulations.² These issues usually surfaced when employees requested approval of activities related to the agencies' responsibilities and, in some cases, the employees' federal duties.

When employees' requests presented potentially problematic situations, agencies sometimes imposed con-

² Insufficient data were available for us to determine whether OPM- and USTR-approved requests, four in total, presented potential conflict-of-interest or standard-of-conduct issues.

ditions on the employees before approving their requests. Four agencies effectively dealt with potential problems in this manner. The agencies' conditional approvals put the employees on notice as to their obligations and, in our view, minimized the risk of possible violations of the conflict-of-interest statutes and standard-of-conduct regulations.

Employees in five other agencies received approval of some outside activities, primarily speaking and consulting, that could not be appropriately handled with conditional approvals. Table 2 shows the extent to which these five agencies approved outside speaking and consulting activities.

Table 2: Speaking and Consulting Approved by Five Agencies

Agency	Total employees with approvals	Speaking ^a		Consulting	
		Number	Percent	Number	Percent
NIH	826	446	54	135 ²	14
FDA	988	30	3	71	7
CDC	301	58	16	29	10
NIST	105	10	4	16	15
EPA-OPTS	44	1	0	12	27

^a Consists primarily of speaking but also includes some articles and appearance. Employees doing these activities, as well as consulting, are counted in both the speaking and consulting columns.

In most cases, employees approved for the above activities indicated in their requests that they would be paid. Although employees did not always show the amounts of compensation, available data show that the amounts were usually less than \$1,000 for each activity. However, for some employees, the cumulative amounts exceeded that amount. For example, 19 NIH employees reported that they were to re-

ceive compensation totaling from \$8,000 to about \$23,000 for outside speeches during fiscal year 1990.

Some of these outside activities were to focus specifically on the agencies' responsibilities and, in some cases, the employees' official duties. When federal employees are paid for outside activities closely related to the agencies' responsibilities, the situation may result in, or create the appearance of, using public office for private gain and thus may violate federal standard-of-conduct regulations. Whether an actual violation occurs depends on how closely the outside activity relates to the agencies' responsibilities.

In 1985, OGE issued guidance on acceptance of compensation in situations involving employees' participation in seminars, conferences, and briefings. OGE advised that compensation was inappropriate when, for instance, an outside activity depends on the use of nonpublic information³ or focuses specifically on the agency's responsibilities, policies, and programs.

On the basis of the information we had available, we believe that NIH, FDA, CDC, NIST, and EPA approved some speaking and consulting activities that were contrary to federal standard-of-conduct regulations and OGE's 1985 guidance. These agencies approved activities that appeared to focus specifically on the agencies' responsibilities and/or the employees' federal duties. For example, NIH approved a request from the branch chief responsible for clinical hematology to receive \$2,000 for a speech on

³ OGE referred in its 1985 opinion to provisions of the 1968 standard-of-conduct regulation (5 C.F.R. 735) on misuse of information. The regulation prohibits an employee from directly or indirectly using, or allowing the use of, official information obtained in connection with an employee's government duties that has not been made available to the general public.

gene transfer. The employee's position description and information in the request indicated that the speech focused specifically on NIH's responsibilities and on the employee's official duties relating to hematology.

In another case, CDC approved a request from the chief of a surveillance activity to give a speech on "Nosocomial Pneumonia" for compensation (amount not given in the request) at an infectious disease seminar. The employee's position description showed he was in the hospital infections program of the Center for infectious Diseases and that his duties included national surveillance and epidemiological studies of nonsocomial infections.

We believe that some agencies approved activities that were questionable as to the appropriateness of accepting compensation because of the agencies' overly permissive policies and practices regarding such activities. For example, NIH officials explained that medical doctors and other employees in highly specialized fields of expertise came to work with NIH believing that they could share their knowledge with others in the profession who have similar interests and responsibilities.

NIH officials also said that designating the requested activities as official duties of the employees could have a significant impact on NIH's budget; NIH's budget is not affected when outside organizations cover the costs for NIH employees' outside activities, such as making speeches and presenting papers. However, under recently granted authority, NIH and other agencies can avoid this budgetary impact. As a result of the Ethics Reform Act of 1989 and interim GSA regulations issued in March 1991, agencies now have authority to accept payments for travel, subsistence, and related expenses from non-

federal sources when employees attend meetings and similar functions relating to their official duties.

Regulations and guidance issued by the Department of Health and Human Services (HHS) and three of its component agencies did not include some restrictions that OGE recommended in its 1985 guidance. Although the OGE memorandum was not binding on the agencies, we believe that it provided useful criteria for distinguishing between official duties and outside activities. Similar criteria were later included both in standard-of-conduct regulations proposed by OGE and bills introduced in Congress on acceptance of honoraria discussed later in this report.

At NIST and EPA, some employees were approved to do outside consulting activities relating to the agencies' responsibilities and involving the use of information generated as a result of the employees' federal duties, as the following examples illustrate.

- EPA approved a request of an EPA chemist to assist a foundation with restructuring its quality assurance program to be consistent with that of EPA's contract laboratory program. The employee was to receive \$60 an hour for up to 120 hours of service over a 12-month period. According to EPA records, the employee worked in an EPA branch responsible for the contractor laboratory program, and the employee's duties included developing environmental-related standards and criteria as part of that program.
- NIST approved a physicist's request to consult for compensation (amount undisclosed) with a private company in developing "a polarized electron source as a commercial product." The employee's official duties included research on spin-polarized electrons, which were to be used in the commercial product. The employee said that (1) the

work depended on information obtained as an agency employee; (2) the work involved a source developed in his official capacity; and (3) the outside employer supplied the employee's division at NIST with equipment, such as electron spin polarization analyzers. A Department of Commerce attorney advised NIST that the consulting could be inappropriate. NIST's records did not show whether or how the attorney's concerns were resolved. In November 1991, after we questioned this approval, the employee advised NIST that a consulting agreement never materialized.

Statutory Proposals Would Continue Honoraria Ban on Certain Government-Related Activities

All of the government-related outside activities previously discussed were approved before January 1991. Congress banned the acceptance of compensation for certain outside activities, effective January 1, 1991. Under the ban, most federal employees are prohibited from accepting money or anything of value for a speech, article, or appearance, whether or not these activities relate to government work.

Due to the broad scope of the ban, Congress began, in January 1991, considering proposals to allow federal employees to receive honoraria under certain circumstances. House and Senate bills include criteria prohibiting the acceptance of compensation for appearances, speeches, and articles that relate primarily to or focus specifically on an agency's responsibilities, policies, or programs. These bills address the acceptance of compensation for some of the activities previously discussed that appear to have been contrary to standard-of-conduct regulations and OGE guidance.

OGE Has Proposed New Standards and Guidance for Agencies

In July 1991, OGE proposed regulations on uniform standards of ethical conduct for executive branch employees. These regulations update standards first established more than 25 years ago. OGE's proposed standards include provisions dealing specifically with outside activities but, in our view, can be strengthened regarding (1) prior agency approval of outside activities and (2) consulting by employees on subjects related to the agency's responsibilities.

Standard on Approval of Outside Activities Can Be Strengthened

The OGE-proposed regulations on employees' outside activities consist largely of references to prohibitions and limitations on employees' outside activities, including the compensation they may receive for such activities. The standards permit agencies to issue supplemental regulations to require employees to obtain approval before engaging in outside activities, when it is desirable for administering the agency's ethics program.

In our view, OGE's standards need to better recognize the value of prior review and approval of employees' outside activities. Our work at the 11 agencies showed that, along with appropriate agency approval criteria, the requirement for employees to obtain prior review of their agency-related outside activities is necessary to avoid violations of conflict-of-interest statutes and standards-of-conduct regulations. OGE's standards identify numerous restrictions on employees' outside activities. Without such prior review and approval, employees could inadequately consider these restrictions and subject themselves to criminal sanctions for violating conflict-of-interest statutes.

As part of the approval process, some agency officials took care to stipulate specific conditions that employees should observe in their outside activities to avoid problems. We also found in agencies that had established weak requirements for approval, employees were found to have violated standards of conduct. In these situations, violations might have been avoided with stronger approval requirements. For example, OPM had limited requirements for approval of outside activities. In addition, EPA's administration of its approval requirements was highly decentralized, and requirements were weakly enforced at one of the two EPA offices we visited. According to information furnished by their Offices of Inspector General, both agencies had investigated and disciplined employees regarding outside activities more often than any of the other nine agencies.

Agency-Related Outside Consulting Requires Guidance

OGE's proposed standards prohibit compensation for teaching, speaking, and writing when the subject matter focuses specifically on the employing agencies' responsibilities, programs, and operations. However, the standards do not specifically address consulting by federal employees when the subject matter of the consulting focuses specifically on the employing agencies' responsibilities, programs, and operations. Our work showed that employees at some agencies did outside consulting for compensation that was closely related to the employing agencies' responsibilities, program, and operations and, in some instances, the employees' official duties. Employees engaged in these consulting activities could be viewed as using public office for private gain.

OGE Audits Usually Covered Agency Controls Over Employees' Outside Activities

Between January 1986 and December 1990, OGE reviewed 9 of the 11 agencies' ethics programs and specifically addressed outside activities in 17 of the 22 resulting audit reports. OGE did not mention outside activities in the remaining five reports. As a result of its audits, OGE made recommendations to address weaknesses that included inappropriate NIH and FDA criteria for approving outside activities related to the agencies' responsibilities. NIH revised its manual after receiving OGE's audit report, but when we did our work at FDA, it had not responded to OGE's recommendations. OGE was again reviewing NIH's approval criteria at the time of our review.

Other agencies also had not fully implemented OGE recommendations. For example, MSPB agreed with OGE to establish written policies on approval of outside activities but had not done so at the time of our review.

We earlier reported that OGE had repeatedly recommended to some agencies over several years to correct weaknesses that we found still existed in 1990.⁴ OGE has taken steps since that time to improve agency acceptance and implementation of OGE recommendations, including, for example, sending audit reports to agency heads instead of ethics officials and being more aggressive on follow-up of open recommendations. OGE had not audited some agency ethics programs as frequently as it desired because of limited OGE staff. OGE increased the size of its audit staff from 2 auditors in 1989 to 12 as of September 1991. In addition to the above,

⁴ *Office of Government Ethics' Oversight Role* (GAO/T-GGD-90-48, June 5, 1990).

OGE has since received additional enforcement authority to obtain corrective action when the Director of OGE determines such action is needed. Under its 1988 reauthorization act, OGE is authorized in some cases to order actions and, if necessary, notify the president and Congress in order to correct deficiencies in agency ethics programs.

Conclusions

The information we gathered indicated that some employees engaged in activities outside the federal government, such as speaking and consulting, that were focused specifically on the agencies' responsibilities and/or related directly to the employees' duties. Generally, the employees were to be compensated for their outside speaking and consulting. We believe the risk that these situations may result in or create the appearance of a conflict of interest can be minimized if agencies apply appropriate criteria to distinguish between matters that are official duties and outside activities. Criteria for these distinctions are included in OGE's proposed standard-of-conduct regulations and in bills being considered by Congress. However, the current criteria are not applied to consulting. OGE needs to provide agencies with guidance on consulting because this activity can also present conflict-of-interest issues when the consulting relates to an agency's responsibilities.

The risk of conflict-of-interest problems for federal employees can also be reduced if agencies require employees to request prior approval for activities that may pose such problems. Such risk is increased when employees engage in outside activities that are related to the agency's mission and operations. Evidence we gathered indicates that approval requirements, along with adequate prior agency review of such activities using appropriate criteria, periodic

updates of approvals, and monitoring of approvals as part of the financial disclosure process, can help avoid conflict problems.

Recommendations

To help avoid ethics problems relating to employees' outside activities, we recommend that the Director, OGE take the following steps:

- Ensure that HHS, Commerce, and EPA fully adopt and comply with applicable restrictions on employees' compensation for outside speeches, articles, and appearances that relate to federal responsibilities.
- Provide agencies with guidance and criteria on the acceptance of compensation for consulting activities that relate to agencies' responsibilities, programs, and operations.
- Revise the proposed OGE standard-of-conduct regulations to require that each agency establish, when appropriate and necessary on the basis of its particular mission and operations, adequate prior agency review of employees' outside activities and periodic update of approvals.

Agency Comments

In commenting on a draft of our report, the OGE Director summarized actions OGE will take to implement all three of our recommendations. (See app. VII.) The Director's written comments followed several discussions we had with OGE officials to clarify our recommendations and agree on actions that OGE would take to respond to our report.

Concerning our first recommendation, OGE said that following the completion of its review of the NIH ethics program, it made a number of recommendations in November 1991 to HHS and NIH addressing problems noted in our report. OGE recommended,

among other things, that HHS issue guidance to component agencies and employees correcting the HHS standard-of-conduct regulations to reflect the standards for outside speaking and writing activities contained in OGE's 1985 guidance. OGE agreed to include a review of agency-related outside activities in its next audits of Commerce and EPA employees to ensure that these agencies comply as well.

In response to our second recommendation, OGE believed that its standard-of-conduct regulations, when issued in final form, will appropriately address consulting activities. OGE said the proposed regulations provide authority for agencies to issue supplemental agency regulations that prohibit compensated outside employment by all or any category of agency employees. OGE agreed to stress in the proposed regulations that (1) the principle that employees are to avoid the appearance of conflicts of interest and (2) the prohibition against use of public office for private gain apply to all outside activities. OGE also agreed to determine on the basis of its future audit work whether more specific guidance on consulting should be provided on a governmentwide basis.

Regarding our third recommendation, i.e., agency approval of employees' outside activities, OGE agreed to strengthen its proposed standard-of-conduct regulations. OGE said the regulations will be revised to provide that an agency shall require prior approval of employees' outside employment and activities when it is determined to be necessary and desirable for the purpose of administering the agency's particular mission and operations.

In addition to OGE's comments, we received written comments on a draft of our report from seven other agencies (Commerce, SBA, USTR, MSPB, OPM, NRC, and HHS). Generally, the thrust of these agencies comments was to suggest changes to im-

prove the accuracy of the data presented in our report, and we have made these changes where appropriate. In its comments, HHS also recognized that its definition of job-relatedness of outside activities differed from ours. HHS said it would defer decisions on departmental changes until it has considered OGE's report on the matter (issued in November 1991) and until related reviews are completed by NIH and the HHS Office of General Counsel.

In addition, Commerce emphasized in its comments that employees are permitted use of their professional expertise in outside activities. We agree with Commerce in concept, but Commerce must also consider other relevant criteria, such as whether the activity focuses specifically on the agency's work. In this regard, our first recommendation to OGE addresses Commerce's (and other agencies') compliance with applicable requirements when approving outside activities. All of the written comments that we received, along with our evaluation of the comments, are included as appendixes to this report.

As agreed with the Subcommittee, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the date of this letter. At that time, we will send copies to the Director, OGE; the heads of the agencies directly responsible for the matters discussed in this report; and other interested parties.

The major contributors to this report are listed in appendix XV. Please contact me at (202) 275-5074 if you or your staff have any questions or need any assistance.

Sincerely yours,

/s/ Bernard L. Ungar
 BERNARD L. UNGAR
 Director, Federal Human Resource
 Management Issues

24a

APPENDIX B

[SEAL]

U.S. Department of Justice
Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

February 1, 1994

Ken Stern, Esq.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420

Re: *National Treasury Employees Union et al. v.
United States, et al*—S. Ct. No. 93-1170

Dear Mr. Stern:

As requested in your letter of January 27, 1994, I
hereby consent to the filing a brief amicus curiae on be-
half of Common Cause.

Sincerely,

/s/ Drew S. Days, III
DREW S. DAYS, III
Solicitor General

25a

COVINGTON & BURLING
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February 1, 1994

Kenneth P. Stern, Esq.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420

Re: *National Treasury Employees Union, et al. v.
United States of America, et al.*

Dear Mr. Stern:

By this letter, my clients consent to your filing, on
behalf of Common Cause, an *amicus* brief in the above
case.

Sincerely,

/s/ John Vanderstar

jld

26a

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

[LOGO]

John N. Sturdivant
National President

Bobby L. Harnage
National Secretary-
Treasurer

Joan C. Welsh
Director,
Women's Department

March 21, 1994

Rebecca Arbogast, Esq.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037

Re: *United States of America et al., v. National
Treasury Employees Union, et al.*, No. 93-1170

Dear Ms. Arbogast:

The American Federation of Government Employees,
AFL-CIO, hereby consents to your filing an amicus
curiae brief in the above-captioned matter before the Su-
preme Court on behalf of Common Cause.

Sincerely,

/s/ Mark D. Roth
MARK D. ROTH
General Counsel

27a

[NTEU LOGO]

The National Treasury Employees Union

March 21, 1994

Kenneth Stern
Wilmer, Cutler, and Pickering
2445 M Street, N.W.
Washington, D.C. 20037

Re: *United States v. NTEU, et al.*, No. 93-1170
(Sup Ct.)

Dear Mr. Stern:

This confirms that the National Treasury Employees
Union, *et al.*, respondents, consent to the filing of an
amicus brief in support of the petitioners by Common
Cause.

Sincerely,

/s/ Gregory O'Duden
GREGORY O'DUDEN
Counsel of Record

No. 93-1170

Supreme Court, U.S.

FILED

JUN - 9 1994

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

NATIONAL TREASURY EMPLOYEES UNION, ET AL.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

JOINT APPENDIX

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**PETITION FOR A WRIT OF CERTIORARI FILED
JANUARY 19, 1994
CERTIORARI GRANTED APRIL 18, 1994**

265 PP

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1170

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

NATIONAL TREASURY EMPLOYEES UNION, ET AL.

ON WRIT OF CERTIORARI
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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V

The following opinions and orders have been omitted in printing this joint appendix pursuant to S. Ct. R. 26.1, because they appear on the following pages in the appendix to the petition for a writ of certiorari:

	Page
Opinion of the court of appeals (filed Mar. 30, 1993, and amended Apr. 8, 1993)	1a-58a
Opinion of the district court (filed Mar. 19, 1992)	59a-78a
Order of the court of appeals denying the petition for rehearing (Sept. 21, 1993)	79a
Order of the court of appeals denying the suggestion for rehearing en banc, with concurring and dissenting statements (Sept. 21, 1993) ...	80a-107a

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 90-2922 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION,
901 E STREET, N.W., SUITE 600,
WASHINGTON, D.C. 20004, (202) 783-4444

and

NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 143,
3211 EAST YANDELL, EL PASO, TX 79903, (915) 562-5477

and

JAN ADAMS GRANT,
5665 REDWOOD LANE,
S. OGDEN, UTAH 84403
(801) 479-6744

and

THOMAS C. FISHELL,
740 VALIANT CIRCLE,
GARLAND, TEXAS 75250
(214) 270-0769

and

ALL SIMILARLY SITUATED UNNAMED PLAINTIFFS,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA,

v.

RICHARD THORNBURGH,
ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE,
10TH AND CONSTITUTION AVENUE, N.W.
WASHINGTON, D.C. 20530
(202) 514-2000

and

(1)

STEPHEN D. POTTS, DIRECTOR,
OFFICE OF GOVERNMENT ETHICS,
1201 NEW YORK AVENUE, N.W.
SUITE 500,
WASHINGTON, D.C. 20005
(202) 523-5757

and

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DEFENDANTS

SECOND AMENDED CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

Plaintiffs bring this class action to challenge the constitutionality of Title VI of the Ethics Reform Act of 1989 (Public Law 101-194, 5 U.S.C. app. 501, *et seq.*) insofar as it prohibits federal employees from receiving honoraria for an appearance, speech or article and subjects federal employees to civil penalties for receipt of such honoraria.

Plaintiff National Treasury Employees Union ("NTEU") is a federal-sector labor union that represents over 140,000 federal employees nationwide. Plaintiff NTEU Chapter 143 (Chapter 143) is a local union chapter representing employees of the Customs Service in El Paso, Texas. Plaintiff Jan Adams Grant is a federal employee and member of NTEU, employed by the Internal Revenue Service at its Service Center in Ogden, Utah.

Plaintiff Grant writes articles for various magazines and delivers speeches to local community organizations for remuneration. Plaintiff Thomas C. Fishell is a federal employee, employed by the Internal Revenue Service at its District Office in Dallas, Texas, and chief steward and executive vice-president of NTEU Chapter 46. Plaintiff Fishell is an ordained minister who delivers speeches and sermons at area churches for remuneration.

Plaintiffs in this suit seek a declaration that the provision of the Ethics Reform Act of 1989 prohibiting federal employees from receiving honoraria for speeches, articles, and appearances violates the Constitution of the United States, specifically the First and Fifth Amendments, and that the implementing regulations by the Office of Government Ethics violate the Administrative Procedure Act, 5 U.S.C. 706(2)(A). In addition to declaratory relief, plaintiffs seek an order enjoining defendants from enforcing the provision at issue.

JURISDICTION

1. This Court has jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1391(e).

VENUE

2. Venue is properly laid before this Court in accordance with 28 U.S.C. 1391(e).

PARTIES

3. Plaintiff NTEU is an unincorporated association having its principal place of business at 901 E Street, N.W., Suite 600, Washington, D.C. 20004. Pursuant to Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, NTEU is the exclusive bargaining representative of approximately 140,000 federal emp-

ployees who work in locations across the nation. NTEU represents the interests of the employees within its bargaining units by, among other things, negotiating collective bargaining agreements, arbitrating grievances, filing unfair labor practices, lobbying, and litigating employees' collective and individual rights in the federal courts. Certain of NTEU's members, as well as non-member employees within NTEU's bargaining units, receive income from articles, speeches, or appearances. The activities are performed in nonwork time and are compatible with the full and proper discharge of the employees' official duties and responsibilities. NTEU sues here on behalf of its members and all employees within its bargaining units whose constitutional rights have been, and will be, violated by the enforcement or threatened enforcement of this statute.

4. Plaintiff NTEU Chapter 143 is a local NTEU chapter representing bargaining unit employees employed by the U.S. Customs Service in El Paso, Texas. Its principal place of business is 3211 East Yandell, El Paso, TX 79903. The Chapter provides representation and services to bargaining unit members at the local level. These activities include collective bargaining, grievance arbitration, and filing unfair labor practice complaints. Such activities also include organizing concerted action by bargaining unit employees, such as demonstrations, letter-writing campaigns, and lobbying. The Chapter also informs employees of their legal rights, notifies them of important opportunities and deadlines, and keeps them abreast of union activities on the local and national levels. The Chapter holds elections to select chapter officers and representatives to national NTEU activities, and holds meetings to determine future activities and discuss the Chapter's position with regard to actions taken by management. To perform these functions adequately, the

Chapter requires a newsletter to communicate with bargaining unit employees. In the past, it has paid a government employee to write and edit its newsletter. That employee has refused to continue writing the newsletter because he can no longer accept payment for his writing. Because the Chapter cannot find an qualified government employee who will write the newsletter without compensation or a qualified nongovernment employee who will produce the newsletter for the sum available, it has ceased to publish its newsletter.

5. Plaintiff Jan Adams Grant is employed by the Internal Revenue Service as a tax examining assistant at its Ogden, Utah, Service Center. Prior to January 1, 1991, Grant wrote articles for publication in magazines such as *Woman's Day*, *Sierra*, and *Camping Today*, on subjects related to the environment and outdoor activities. Grant also regularly delivered speeches to local church groups on earthquake preparedness. Grant received remuneration for her articles and speeches. She had solicited and received approval of the IRS for this outside employment. Grant is subject to the restriction on receipt of compensation and ceased submitting articles for publication and delivering speeches following the effective date of that restriction.

6. Plaintiff Thomas C. Fishell is employed by the IRS as a tax examining assistant at its District Office in Dallas, Texas. Fishell is also a self-employed ordained and licensed minister who regularly conducts funerals and weddings, delivers sermons and makes other speeches to church groups on religious topics and on church administrative subjects. Fishell received remuneration for these activities. Fishell solicited and received permission from the IRS in 1984 to engage in this outside employment. Fishell is subject to the restriction on receipt of compensation for delivery of speeches⁶ and sermons during

worship services conducted by other ministers. Following January 1, 1991, Fishell has severely curtailed these activities, cancelling a sermon that he was to have delivered during worship services conducted by another minister.

7. Similarly situated unnamed plaintiffs are every "employee" of the federal government, as defined by the interim rule issued at 5 Fed. Reg. 1723 (January 17, 1991), to be codified at 5 C.F.R. 2636.102(c) & (d), below grade GS-16, who – but for 5 U.S.C. app. 501(b) – would receive "honoraria" as defined in 5 U.S.C. app. 505(3).

8. Defendant United States is properly named because the suit challenges the constitutionality of a federal statute.

9. Defendant Richard Thornburgh, named in his capacity as Attorney General of the United States, is charged with enforcement of this statute. 5 U.S.C. app [sic] Sec. 504(a) provides, in pertinent part, that "[t]he Attorney General may bring a civil action in any appropriate United States district court against any individual who violates any provision of section 501. . . ."

10. Defendant Stephen D. Potts is named in his capacity as Director of the Office of Government Ethics. Defendant Office of Government Ethics ("OGE") is charged with administrative authority, under 5 U.S.C. app. 503, to issue rules and regulations under this Title with respect to officers and employees of the executive branch.

STATEMENT OF CLAIMS

11. Title VI of the Ethics Reform Act of 1989 (Public Law 101-194, 5 U.S.C. app. 501, *et seq.*) was enacted on November 30, 1989, and took effect on January 1, 1991. Sec. 603. Sec. 501(b) states that "[a]n individual may not receive any honorarium while that individual is a Member, officer or employee." Sec. 505 defines "officer or employee" as "any officer or employee of the Government except (A) any individual (other than the Vice President) whose compensation is disbursed by the Secretary of the

Senate or (B) any special Government employee (as defined in section 202 of title 18, United States Code)." Sec. 505 further defines "honorarium" as "a payment of money or any thing of value for an appearance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses"

12. Section 504 of that title provides that "[t]he Attorney General may bring a civil action in any appropriate United States district court against any individual who violates any provision of section 501. . . . The court in which such action is brought may assess against such individual a civil penalty of not more than \$10,000 or the amount of compensation, if any, which the individual received for the prohibited conduct, whichever is greater."

13. Defendant Office of Government Ethics issued interim regulations on January 17, 1991, effective January 1, 1991. 5 C.F.R. Part 2636, 56 Fed. Reg. 1721 (Jan. 17, 1991). The regulations, among other things, define "article" as "a writing, other than a chapter of a book, which has been or is intended to be published or republished in a journal, newspaper, magazine or similar collection of writings" but does not include "works of fiction, poetry, lyrics, or script." 56 Fed. Reg. at 1726. It defines "speech" as "an address, oration, or other form of oral presentation." 56 Fed. Reg. at 1725. The regulations further state that a "speech" does not include "the conduct of worship services or religious ceremonies" but does include "a talk on theology given to other ministers, . . . offering a prayer at the opening of a convention or . . . delivering a sermon during a worship service conducted by another minister." 56 Fed. Reg. at 1725-26.

14. Plaintiff Grant is an "employee" within the meaning of the title. Grant has an advanced degree in geophysics. With the permission of her agency, she has long

been engaged in writing non-fictional articles for publication and delivering speeches in her nonwork time in exchange for remuneration. The articles, published in magazines, address a variety of environmental issues. The speeches, delivered to local church groups, concern earthquake preparedness. The subject-matter of her articles and speeches is entirely unrelated to her duties and responsibilities as a federal employee. She estimates that she received approximately \$3000 from her writing and speeches in 1990.

15. Plaintiff Grant is also engaged in writing a book of fiction with some factual basis, tentatively titled *The Green Shovel*. She has submitted three chapters to a publisher, Morrow & Son. Publishers more readily accept a book manuscript for publication from a new author when that author has published numerous articles in magazines.

16. Because of the enactment of the ban on receipt of compensation for article writing and speeches, plaintiff Grant has ceased delivering speeches and submitting query letters to magazine publishers. A query letter is a proposal for an article to be submitted for publication.

17. Plaintiff Grant will suffer continuing and irreparable harm if the requested relief is denied. Absent a declaration that the prohibition on receipt of payment is unconstitutional and its enforcement enjoined, Grant will not submit articles for publication or deliver speeches. Without the additional professional activity that the publication of articles represents, Grant may encounter greater difficulty in securing a publisher for the book that she is currently writing.

18. As a professional writer and speaker, Grant is entitled to payment for her articles and speeches. Grant incurs significant expenses in connection with her expressive

activity, including such capital expenses as the purchase of word processing equipment, magazine subscriptions, and relevant research literature. Grant has also invested significant time and expense in acquiring the educational background necessary for her writing and speaking. In devoting her time to writing and speaking, Grant has foregone opportunities to engage in other activity for which she could lawfully accept compensation. Compensation for her writing and speaking is an incentive that encourages her to write and speak, and the ban on receipt of payment is a penalty on her choice to engage in that activity, rather than some other income-producing activity.

19. Plaintiff Thomas C. Fishell is an "employee" within the meaning of the title. He is also a self-employed ordained and licensed minister. With the permission of his agency and on nonwork time, Fishell delivers sermons during worship services conducted by other minister, as well as sermons during his worship services, and presents speeches to local church groups on religious topics and on church administrative matters. In the past, Fishell has accepted compensation for these activities. His net income from all of his outside religious activities in 1990 was approximately \$1000.

20. Because of the ban on receipt of payment for speeches and appearances, plaintiff Fishell has cancelled a sermon that he was to have delivered as a guest minister during a worship service conducted by another minister.

21. Plaintiff Fishell will suffer continuing and irreparable harm if the requested relief is denied. A prohibition on the receipt of income from his appearances and speaking engagements will directly burden his ability and willingness to engage in such activity. Fishell has incurred considerable expense in pursuing his theological education and continues to incur expenses in connection with his

speeches and sermons as visiting minister, including the purchase of books and treatises and word processing equipment. Even assuming that he could recoup such expenses, he requires payment as compensation for his time and training. The payment serves as a partial substitute for payment that he could have earned in other activity, had he not devoted his time to the speeches and sermons in question. The payment is also an incentive to pursue such activity, and the ban on receipt of payment is a penalty on his choice to engage in that activity, rather than some other income-producing activity.

22. Plaintiff NTEU is the recognized collective bargaining representative for plaintiffs Grant and Fishell, as well as other federal employees who either are currently or will be writing articles or making speeches or appearances for recompense. NTEU's responsibilities as representative of federal employees include vigorous advocacy of members' rights, including their First Amendment right to make speeches and appearances and to write articles. The First and Fifth Amendment rights of NTEU's members are directly burdened by the prohibition on receipt of income from speeches, appearances, and articles.

23. Plaintiff NTEU Chapter 143 requires a regularly published newsletter in order to perform adequately the functions of a chapter set forth above at paragraph 4. A newsletter serves as the union organ, alerting bargaining unit members to union and management activities, notifying them of important dates and deadlines, announcing union meetings and elections, and describing employee rights and opportunities for advancement. The newsletter is also a means for the Chapter to inform employees of the official position taken by the Chapter with respect to matters of concern to bargaining unit members.

24. Before January 1, 1991, Chapter 143 paid an employee of the U.S. Customs Service in El Paso, Texas,

\$100 a month to write articles for the newsletter, on a non-contractual basis. By relying on the paid services of one individual, the Chapter was able to assure the regular, timely publication of a comprehensive, well-written, and well-informed newsletter for use by the Chapter, its members, and other bargaining unit employees.

25. Following the effective date of the ban on receipt of payment for articles, the newsletter writer could no longer accept compensation for writing the newsletter. He refused to continue writing the newsletter without compensation.

26. The Chapter has been unable to find a qualified Customs employee to write the newsletter on a volunteer basis, without compensation, or a qualified individual, who is not a government employee, who was willing to write the newsletter for a fee that meets the Chapter's budget. The Chapter has been unable to publish a newsletter in 1991 as a result of the ban on receipt of compensation for article writing. The discontinuation of the newsletter has seriously harmed the Chapter by hindering its communication with represented employees.

CLASS ACTION ALLEGATIONS

27. This class action may be maintained under Fed. R. Civ. P. 23(a) and 23(b)(2).

28. In addition to the named plaintiffs, the class includes all "employees" of the federal government, as defined by the interim rule issued at 56 Fed. Reg. 1723 (January 17, 1991), to be codified at 5 C.F.R. 2636.102(c) & (d), below grade GS-16, who—but for 5 U.S.C. app. 501(b)—would receive "honoraria," as defined in 5 U.S.C. app. 505(3). The precise size of this class is unknown, but it potentially includes hundreds or thousands of individuals dispersed throughout the United States, and thus constitutes a class too numerous to bring before the court individually.

29. There are questions of law or fact common to all members of the class. Each member of the class receives or would receive honoraria, as defined in section 505, for an appearance, speech or article, were it not for the Ethics Reform Act's prohibition against their receipt. The prohibition against receipt of honoraria directly burdens the First and Fifth Amendment rights of each member of the class. The prohibition is unconstitutional on its face and as applied because it is arbitrary, overbroad and not justified by a sufficient government interest.

30. The claims of the named plaintiffs are typical of the class; the First and Fifth Amendment rights of the named and unnamed plaintiffs are all violated by the Ethics Reform Act.

31. The representative plaintiffs will adequately and fairly protect the interests of the class. Plaintiff NTEU is a federal sector labor organization that represents 140,000 federal employees nationwide through collective bargaining, lobbying and litigation. NTEU has significant experience representing federal workers in lawsuits challenging illegal and unconstitutional government action. The named plaintiffs have suffered or will suffer injuries for a cause identical to those of the unnamed plaintiffs. Relief may be granted to the class without any adverse effect upon any other class member.

32. The class action is maintainable under Fed. R. Civ. P. 23(b)(2) because defendants have acted to violate the First and Fifth Amendment rights of the named and unnamed class members in a manner generally applicable to the class, making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

CAUSES OF ACTION

33. Plaintiffs reassert and reallege each and every allegation in paragraphs 1 through 32 above.

34. The First Amendment to the United States Constitution protects the right of individuals to freedom of speech. The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

35. Prohibiting federal employees from receiving income from speeches, articles or appearances unrelated to their federal employment directly burdens and severely impedes their exercise of their right to engage in such activities without serving any legitimate government purpose.

36. The statute challenged above, both as written and as construed by the Office of Government Ethics, violates the First and Fifth Amendments to the United States Constitution because it is arbitrary, vague, and overbroad.

37. The statute violates the First Amendment because it is not narrowly drawn to satisfy only legitimate government interests.

38. The regulations issued by the Office of Government Ethics are arbitrary and capricious, in violation of 5 U.S.C. 706(2)(A).

REQUEST FOR RELIEF

WHEREFORE, based on the foregoing, plaintiffs request judgment against the defendants:

A. Declaring that Title VI of the Ethics Reform Act of 1989 (Public Law 101-194, 5 U.S.C. app. 501, *et seq.*) is unconstitutional on its face and as applied, insofar as it prohibits plaintiffs from receiving honoraria for an appearance, speech or article and subjects them to civil penalties for receipt of such honoraria;

B. Enjoining defendants from enforcing the prohibition on receipt of honoraria against plaintiffs;

C. Ordering defendants to pay a reasonable amount of attorney's fees and costs as determined by the Court;

D. Ordering such further relief as the Court deems just and proper.

Respectfully submitted,

/s/ Gregory O'Duden

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[April 30, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA. No. 90-3027

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, 80 F STREET, N.W., WASHINGTON, D.C. 20001
(202) 639-6426

and

DAVID E. HUBLER 4109 BREEZEWOOD LANE, ANNANDALE,
VIRGINIA 22003, (703) 354-8709, PLAINTIFFS

v.

UNITED STATES OF AMERICA,

and

RICHARD L. THORNBURGH, ATTORNEY GENERAL,
U.S. DEPARTMENT OF JUSTICE, 10TH AND CONSTITUTION
AVENUE, N.W., WASHINGTON, D.C. 20530, (202) 514-2000

and

STEPHEN D. POTTS, DIRECTOR, OFFICE OF GOVERNMENT
ETHICS, 1201 NEW YORK AVENUE, N.W. SUITE 500,
WASHINGTON, D.C. 20005, (202) 523-5757

DEFENDANTS

[13 DEC. 1990]

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

This is an action to challenge the constitutionality, and
enjoin the enforcement of, Title VI, § 601(a) of the Ethics

Reform Act of 1989, Public Law 101-194, ("the Act") to the extent that it prohibits all federal employees from accepting payment or anything of value for an appearance, speech or article, and subjects them to civil penalties for violation of the prohibition. Plaintiffs seek (1) to obtain a declaration by the Court that this provision of Title VI of the Act is contrary to the First and Fifth Amendments to the United States Constitution and (2) to enjoin enforcement of said provision.

JURISDICTION

1. Jurisdiction in the matter is granted to the United States District Court pursuant to 28 U.S.C. § 1331.

VENUE

2. Venue is properly before this Court in accordance with 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff American Federation of Government Employees, AFL-CIO, ("AFGE") is a labor union representing approximately 700,000 federal employees worldwide, including those individual named plaintiffs in the instant action. AFGE seeks to preserve the economic, civil, and constitutional rights of its members through collective bargaining, lobbying and litigation. AFGE is suing on its own behalf, and on behalf of its members adversely affected by the prohibition against honoraria contained in Title VI of the Act.
4. Plaintiff David E. Hubler is presently employed as a "features writer" by the Voice of America, a component of the United States Information Agency,

located at 330 Independence Avenue, Room 3446, Washington, D.C. 20547. He is also a member of the bargaining unit represented by Local 1812 of the American Federation of Government Employees, AFL-CIO.

5. Defendant United States is properly named because the suit challenges the constitutionality of a federal statute.
6. Defendant Richard L. Thornburgh is the Attorney General of the United States and, as such, is responsible for enforcement of Title VI of the Act. He is sued solely in his official capacity.
7. Defendant Stephen D. Potts is the Director of the Office of Government Ethics, has administrative authority to issue rules and regulations under Title VI of the Act. He is sued solely in his official capacity.

FACTS

8. The Ethics Reform Act of 1989, enacted on November 30, 1989, is currently scheduled to take effect on January 1, 1991. The Act was intended to amend the Ethics in Government Act of 1978. It addresses a wide range of ethical questions arising in the context of government employment including, but not limited to, outside and post-employment activities of certain legislative and executive branch employees.
9. Title VI of the Act, amending Title V of the Ethics in Government Act of 1978, in part prohibits the receipt of honoraria by all federal employees. Specifically, Title VI amends § 501(b) and (c) of the earlier legislation to read:

(b) HONORARIA PROHIBITION. — An individual may not receive any honorarium while

that individual is a Member, officer or employee.

(c) TREATMENT OF CHARITABLE CONTRIBUTIONS.—Any honorarium which, except for subsection (b), might be paid to a Member, officer or employee, but which is paid instead on behalf of such Member, officer or employee to a charitable organization, shall be deemed not to be received by such Member, officer or employee. No such payment shall exceed \$2000 or be made to a charitable organization from which such individual or a parent, sibling, spouse, child, or dependent relative of such individual derives any financial benefit.

10. The Act defines "honorarium" as "a payment of money or any thing of value for an appearance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative). . . ." *Id.* In addition, "officer or employee" is therein defined as "any officer or employee of the Government except (A) any individual (other than the Vice President) whose compensation is disbursed by the Secretary of the Senate or (b) any special Government employee (as defined in section 202 of title 18, United States Code)." *Id.*
11. Plaintiff American Federation of Government Employees, AFL-CIO, ("AFGE") represents individuals in recognized bargaining units who are "employees" within the meaning of Title VI of the Act and whose rights under the First and Fifth Amendments to the United States Constitution will be violated by the challenged provision of the Ethics Reform Act.
12. Plaintiff Hubler has been employed by the Voice of America for fourteen years and has been a federal employee for twenty-four years. As a features writer

for the Voice of America, his duties involve writing pieces about American life and book reviews for purposes of broadcast over the Voice of America radio stations.

13. One of Mr. Hubler's interests, unrelated to his employment, which he pursues during off-duty hours is travel writing. He has been writing magazine and newspaper articles about travel on a free-lance basis for approximately ten years. His writing focuses primarily on areas in the Caribbean and Florida. Depending upon the length of the article, he receives approximately \$500 to \$1,500.
14. In 1990, plaintiff Hubler published three to four travel articles on a free-lance basis. Previous to becoming aware of the Ethics in Government Act of 1989, he had every expectation of continuing to publish articles, unrelated to his duties as a Voice of America employee, and receive payment for such publication after January 1, 1991. In addition, after January 1, 1991, some of his previously published articles will be reprinted for which he will receive payment.
15. The Act's prohibition against receipt of payment for his writings will effectively suppress Mr. Hubler's ability to write and publish articles. For instance, the expenses necessarily incurred in travel writing for which he receives payment extend beyond those that merely cover transportation and lodging, and would thereby be excluded under the Act. A prohibition against receipt of such expenses will impair his ability to engage in the type of activities about which he writes. Moreover, even if he were somehow able to underwrite his own travel writing and submit articles for free, he would not do so, as it would undermine

the ability of his colleagues, whose primary support derives from travel writing, from earning a living.

16. During the ten years that Mr. Hubler has been travel writing, he has cultivated and developed credibility and a reputation among the community of editors who determine whether his work gets published. The Act's prohibition will effectively remove him from contact with this community, which will, in turn, adversely affect his ability to write and publish travel articles.
17. Under the challenged legislation, the Attorney General has the power and duty to begin enforcement of the unconstitutional statutory provisions as of January 1, 1991, by bringing civil actions against federal employees found to be in violation. These employees face a penalty of up to \$10,000.

CAUSES OF ACTION

COUNT I

18. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 17.
19. The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the Press; or the right of the people peaceably to assemble,"
20. The prohibition against the receipt by any federal employee of payment for speeches, articles or appearances for matters completely unrelated to the employees' duties is unconstitutional on its face as it is overbroad in its restriction on federal employees' right to engage in speech otherwise protected under the First Amendment.

COUNT II

21. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 17.
22. The prohibition against the receipt by any federal employee of payment for speeches, articles or appearances for matters completely unrelated to the employees' duties is unconstitutional as applied to plaintiff Hubler as it impermissibly infringes upon his protected First Amendment rights to freedom of speech.

COUNT III

23. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 17.
24. The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."
25. The broad prohibition against receipt of honorarium by any federal employee contained in Title VI of the Ethics Reform Act of 1989 violates the equal protection guarantee of the Fifth Amendment without serving any legitimate governmental purpose. Its distinction between those employees earning outside income and those receiving payment for engaging in speech impermissibly impinges upon federal employees' fundamental rights to freedom of speech.

COUNT IV

26. Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 17.
27. The broad prohibition against receipt of honorarium by any federal employee contained in Title VI of the

Ethics Reform Act of 1989 violates the due process guarantee of the Fifth Amendment without serving any legitimate governmental purpose. It impermissibly deprives federal employees of their fundamental rights to liberty and property by prohibiting them from engaging freely in activities unrelated to their governmental employment and depriving them of the economic benefits of their off-duty expressive activities.

WHEREFORE, Plaintiffs pray that this Honorable Court enter an Order:

- (1) Declaring that Title VI of the Ethics Reform Act of 1989 is unconstitutional;
- (2) Enjoining Defendants and their agents from enforcing Title VI of the Ethics Reform Act of 1989.
- (3) Ordering defendants to pay plaintiffs' attorney fees and costs; and
- (4) Granting such other relief as this Court finds necessary and proper.

Respectfully submitted,

/s/ Mark D. Roth

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[December 13, 1990]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 90-3044 (TPJ)

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ARNOLD A. PUTNAM, RURAL ROUTE 2, BOX 1354, WILDES
DISTRICT ROAD, KENNEBUNKPORT, MAINE 04046,
PLAINTIFFS

v. -

UNITED STATES OF AMERICA, RICHARD THORNBURGH,
ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE,
100TH AND CONSTITUTION AVENUE, N.W.,
WASHINGTON, D.C. 20530

STEPHEN D. POTTS, DIRECTOR, OFFICE OF GOVERNMENT
ETHICS, 1201 NEW YORK AVENUE, N.W., SUITE 500
WASHINGTON, D.C. 20005, DEFENDANTS

AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, by their attorney, complain of defendants as follows:

1. This is an action to challenge the constitutionality of Title VI of the "Ethics Reform Act of 1989," Public Law 101-194, 103 Stat. 1716, 1760-63 (November 30, 1989), as amended by Section 7 of Public Law 101-280, 104 Stat. 149, 161 (May 4, 1990), which amended Title V of the Ethics in Government Act of 1978, 5 U.S.C. §§ 501-05, insofar as it prohibits employees of the United States Government from receiving "honoraria," as defined therein, on and after January 1, 1991, and subjects them to civil penalties therefor. The statute that is the subject of this suit is hereinafter referred to as the "honorarium statute."

JURISDICTION

2. This Court has jurisdiction under 28 U.S.C. § 1331 over this action, which arises under the Constitution of the United States.

VENUE

3. Venue is properly laid in this jurisdiction under 28 U.S.C. § 1391(e) inasmuch as the defendants are the United States, officers thereof acting in their official capacity, and an agency thereof, and one or more defendants resides in this judicial district.

PARTIES

4. Plaintiff Peter G. Crane is a lawyer at the Nuclear Regulatory Commission in Rockville. He works on special projects in the Office of the General Counsel. On his own time, he has extensively researched the efforts of the Czarist government of Russia in the 1890s to model that country's economy after the economy of the United States. He plans to write an article for publication on this subject and to be paid for it. In addition, he is preparing to write for publication an article based on his great-grandfather's extensive interview with Leo Tolstoy in 1898; he believes this article, for which he expects to be paid, will contribute to the body of Tolstoy scholarship and will contain information not previously known to scholars. Mr. Crane has already published one article for pay since the honorarium statute took effect. Although he donated the payment to a charity, the Inspector General's office informed him that he was still considered to be in violation of the statute.

5. Plaintiff Richard Deutsch is employed by Voice of America, the international radio broadcast arm of the U.S. Information Agency, in Washington, D.C. He is business editor and a senior writer/correspondent on economics. On his own time and without using government resources, Deutsch has written more than 60 articles that have been published in an array of journals. Consistent with agency policy, Deutsch has received fees for his published articles. Had he not been allowed to receive such fees, he would have written fewer articles and devoted his extra time to other paying work. Since the honorarium statute went into effect, Mr. Deutsch has rejected various offers to publish for pay.

6. Plaintiff Charles Fager is a mailhandler for the U.S. Postal Service in Arlington, Virginia. For the past fifteen years he has been writing and speaking on topics related to

his church the Society of Friends or Quakers. He is occasionally offered payment for speaking engagements before Quaker groups. In March of 1991 he delivered a series of lectures at Guilford College in Greensboro, North Carolina. He was reimbursed for his expenses and paid a \$300 fee. He had written to the appropriate agency official over three weeks in advance seeking clearance for his speaking activity. He finally received an oral response the day before he left for North Carolina. This obviously created great uncertainty. It was only because Mr. Fager had agreed to make this speaking appearance before the honorarium statute went into effect that the payment was not prohibited. He intends to engage in other speaking activities in the future and were it not for the honorarium statute, he would expect to receive payment when offered. Mr. Fager considers the prohibition of payment to be a disincentive to continue speaking and writing.

7. Plaintiff William H. Feyer is employed by the United States Department of Labor in New York, New York. He handles applications for certification of sheltered workshops and patient worker programs in the region encompassing New York, New Jersey, and the Caribbean. Feyer is also an ordained rabbi. During non-working hours, he travels throughout the United States and Canada delivering lectures, teaching classes, and leading seminars at churches, synagogues, and other spiritual centers. Feyer is paid for his rabbinic activities. He presently has scheduled many appearances throughout 1991 and early 1992. If he is not allowed to accept pay for these appearances, he may be forced to cancel his commitments.

8. Plaintiff Robert A. Gordon is an Aerospace Engineer at the Goddard Space Flight Center in Greenbelt, Maryland. For the past five years he has given various lectures on subjects related to Black History. He is normally

paid a fee for his efforts. In March of 1991 he delivered two lectures at the Maryland Institute of Art. He had already been informed by his Agency Ethics Officer that any payment above "actual and necessary" travel expenses would be in violation of the law. Because his travel expenses were de minimus he intends to deposit the payment checks into an escrow account pending the resolution of this case. Mr. Gordon relies on the small payments he receives for his lectures to continue funding his research expenses, which are often intangible or not linked to a particular lecture.

9. Plaintiff Judith Lynne Hanna, Ph.D., has been employed since September 1989 as an Education Program Specialist at the U.S. Department of Education in Washington, D.C. Before then, Dr. Hanna had been a Senior Research Scholar at the University of Maryland. She has written six books and more than 75 articles, and has lectured extensively in the fields of anthropology, ethnomusicology, dance ethnology, racial tension, and gender. She normally receives a fee or other payment for her articles and lectures. She has continued to write and lecture for a fee, with the approval of her agency, since becoming a federal government employee. She wishes to continue to do so, both for the added income and as a matter of professional development.

10. Plaintiff George J. Jackson, Ph.D., is a microbiologist for the Food and Drug Administration, U.S. Department of Health and Human Services, in Washington, D.C. He also writes dance reviews and lectures on dance for university and theatre audiences. He has written dance reviews regularly for the *Washington Post* since 1978 and for *Dance Magazine* in New York since 1985. He is paid for his articles on a per piece basis. He is also paid for some, but not all, of his lectures. Since the honorarium statute went into effect Dr. Jackson has been writing for

the *Post* without pay, but the *Post* considers this only a temporary arrangement as it ordinarily does not accept articles if they are simply "donated." In addition, the Dance Critics Association, of which he is the past President, strongly discourages its members to write for no pay. He wishes to continue writing and speaking on dance, as he has done for so many years, because it is something he enjoys immensely.

11. Plaintiff Eduard Mark, Ph.D., has been a historian for the Department of the Air Force for nine years. As a professional historian, he has written numerous essays, book reviews, and other pieces for publication and from time to time receives compensation for these writings. All of this work has been on his own time and is in full compliance with the extensive regulations of the Air Force on the subject of outside writing. He wishes to continue doing such writing, for compensation when that is otherwise appropriate, and believes that this activity is essential to his continued professional development as a scholar, a belief that is reinforced by the encouragement provided by his superiors.

12. Plaintiff Arnold A. Putnam is an Electronics Engineering Technician employed by the federal government at the Portsmouth Naval Shipyard in Portsmouth, New Hampshire. He prepares and develops engineering drawings for electronic equipment aboard nuclear submarines. On his own time, he writes articles in the areas of philosophy, American history, and the history of science and technology. He recently published an article discussing the "USS AGAMENTICUS" (a ship constructed during the Civil War), for which he was paid a fee. He is currently researching and writing several articles that he intends to publish in 1991. He will likely discontinue his research and writing if he is not allowed to receive any fees

upon the publication of his articles, because he needs such fees to defray the cost of his research.

13. Defendant United States of America is properly made a defendant herein because this suit challenges the constitutionality of a federal statute.

14. Defendant Richard Thornburg is made a defendant herein solely in his official capacity as Attorney General of the United States. In that capacity he is charged by 5 U.S.C. § 504(a) with enforcement of the honorarium statute.

15. Defendant Stephen D. Potts is made a defendant herein solely in his official capacity as Director of the Office of Government Ethics. Defendant Office of Government Ethics is made a defendant herein because it is charged by 5 U.S.C. § 503(2) with responsibility to issue rules and regulations under the honorarium statute with respect to officers and employees of the executive branch.

THE HONORARIUM STATUTE

16. The honorarium statute provides that "[a]n individual may not receive any honorarium while that individual is a Member, officer or employee." 5 U.S.C. § 501(b).

(a) For purposes of the honorarium statute, an "officer or employee" is defined to mean "any officer or employee of the Government except" Senate employees and "any special Government employee" (as defined in 18 U.S.C. § 202, which covers temporary government employees, part-time commissioners and magistrates, independent counsels, and members of the reserve forces when placed on active duty). 5 U.S.C. § 505(2).

(b) For purposes of the honorarium statute, the term "honorarium" is defined to mean "a payment of money or any thing of value for an appearance, speech or article" by

an officer or employee, but excluding payment of travel and related expenses. 5 U.S.C. § 503(3).

17. The honorarium statute is "subject to the rules and regulations of . . . the Office of Government Ethics . . . with respect to officers and employees of the executive branch. . . ." 5 U.S.C. § 503(2).

18. At the time the original complaint was filed defendant Office of Government Ethics had not issued any such rules or regulations. Instead, on November 28, 1990, that Office issued a "Memorandum" over the signature of defendant Potts which purports to provide "initial guidance regarding the application of" the honorarium statute.

(a) The Memorandum states that the content of it "has been coordinated with the Department of Justice and the Office of Personnel Management," that the Office of Government Ethics expects that implementing regulations "will be consistent in all respects" with the Memorandum, and that "employees may rely on the guidance contained in" the Memorandum.

(b) The Memorandum makes clear that, unlike the law and regulations in effect prior to January 1, 1991, the prohibition on receipt of honoraria "applies even without a nexus between the appearance, speech or article and the individual's federal employment.

(c) The Memorandum predicts that the definitions of "appearance, speech, or article" contained in 11 C.F.R. § 110.12(b), issued by the Federal Election Commission, would be adopted for purposes of the honorarium statute. However, the Memorandum goes on to set forth certain activities that will probably not be covered by the statutory prohibition, such as "works of fiction, poetry, lyrics and scripts."

(d) The Memorandum further states that the statutory prohibition will not cover compensation for "services on a

continuing basis that involve appearing, speaking or writing," but government employees are at the same time cautioned that they cannot circumvent the statutory prohibition "by contracting for a continuing series of talks, lectures, speeches or appearances and characterizing the income as a stipend or as salary."

19. On January 17, 1991 the Office of Government Ethics issued interim rules with request for comments. No final rules have been issued to date.

20. The honorarium statute provides for enforcement through civil actions by the Attorney General against any individual who violates 5 U.S.C. § 501 and provides that the court may assess against such an individual a civil penalty of \$10,000 or the amount of compensation the individual received for the prohibited conduct, whichever is greater. 5 U.S.C. § 504(a).

21. The honorarium statute provides that it "shall take effect on January 1, 1991," but that it "shall cease to be effective" if Section 703 of the Ethics Reform Act of 1989, which provided for a 25 per cent pay raise for Members of the House of Representatives, for senior executive branch officers and employees, and for federal judges, is subsequently repealed. Pub. L. 101-194, Sec. 603. Said Section 703 has not been repealed. The honorarium statute went into effect on January 1, 1991.

EFFECT OF THE HONORARIUM STATUTE

22. Each plaintiff is an "officer or employee" of the executive branch within the meaning of the honorarium statute.

23. As set forth in greater detail in paragraphs 4 through 13 above, each plaintiff has in the past, while an "officer or employee," received compensation for making an "appearance," giving a "speech," or writing an

"article," as the quoted words are used in the honorarium statute as interpreted by the Memorandum dated November 28, 1990, referred to in paragraph 19 above. Each plaintiff would reasonably expect to continue doing so, but for the honorarium statute. In so doing, each plaintiff would be exercising his or her rights to speak and publish and, in the case of plaintiff Feyer, to practice his religion, all of which rights are protected by the First Amendment to the Constitution of the United States. The honorarium statute, by prohibiting receipt of compensation for such activities, imposes burdens, which are immediate and irreparable, on the exercise of these rights by plaintiffs.

CAUSE OF ACTION

24. The honorarium statute, both as written and as construed by the Office of Government Ethics, violates the First Amendment to the Constitution of the United States.

25. No government interest has been identified that justifies the overly broad imposition on plaintiffs of the burdens on their First Amendment rights summarized above.

26. The honorarium statute is not narrowly drawn to satisfy only such interest the government may legitimately have in restricting the speech and writing of government employees.

27. The honorarium statute, both as written and as construed by the Office of Government Ethics, is impermissibly vague in its description of the expressive activities that it covers, in violation of the First and Fifth Amendments.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for judgment against defendants:

A. Declaring that Title VI of the Ethics Reform Act of 1989 (Pub. L. 101-194, as amended by Pub. L. 101-280) is unconstitutional insofar as it prohibits government officers and employees, as defined therein, from receiving honoraria, as defined therein.

B. Enjoining defendants from enforcing such prohibitions against plaintiffs.

C. Ordering such further and different relief, including costs and attorneys' fees, as to the Court may appear just and proper.

Respectfully submitted,

/s/ John Vanderstar

JOHN VANDERSTAR

D.C. Bar No. 52506

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Dated: April 11, 1990

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-2922

NATIONAL TREASURY EMPLOYEES UNION,
ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Civil Action No. 90-3027

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Civil Action No. 90-3044

PETER G. CRANE, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

ORDER

Upon consideration of the several motions, the opposition thereto, and the arguments thereon in open court on December 20, 1990, it is, this 20th day of December 1990,

ORDERED, that the unopposed motion by Common Cause to participate as amicus curiae is granted; and it is FURTHER ORDERED, that Civil Action No. 90-2922, Civil Action No. 90-3027 and Civil Action No. 90-3044 be consolidated for all purposes pending further order of Court; and it is

FURTHER ORDERED, that plaintiffs' application for a temporary restraining order is denied; and it is

FURTHER ORDERED, that plaintiffs' motion for a preliminary injunction is denied; and it is

FURTHER ORDERED, that plaintiffs' motion for a temporary restraining order pending the appeal of this Court's denial of their motion for a preliminary injunction is denied.

/s/ Thomas Penfield Jackson

THOMAS PENFIELD JACKSON
U.S. District Judge

EXHIBIT I

DECLARATION OF PETER G. CRANE

1. I am a lawyer employed by the Nuclear Regulatory Commission and have been since April 1975. I received my A.B. degree from Harvard in 1968 and my J.D. from Duke in 1973. I have been in the Office of the General Counsel since 1977. My current position, which I have held for several years, is as Counsel for Special Projects. My current government grade level is GS-16. My home address is 4809 Drummond Avenue, Chevy Chase, Md. 20815.

2. Prior to joining the NRC, I wrote one article for publication and received payment for it. The article, entitled "Politics and Pesticides: Dieldrin Gets a Reprieve," appeared in *The Washington Post*, July 28, 1974, sharply criticized EPA's failure to order suspension of the pesticides aldrin and dieldrin. A copy of the article appeared in a 1974 Senate committee report on EPA's regulation of pesticides. Five days after the article appeared in the *Post*, the EPA Administrator issued a "Notice of Intention to Suspend" those chemicals. EPA's action was upheld by the U.S. Court of Appeals for the D.C. Circuit in *Environmental Defense Fund v. EPA*, 510 F.2d 1292 (1975).

3. Since becoming a government employee, I have maintained my interest in writing, and recently I began to act on that interest. I took a substantial period of leave without pay during 1990, both to spend more time with my family and to pursue writing projects in the area of history.

4. During that time, I did extensive research for an article on the efforts of the Czarist government of Russia, during the 1890's, to restructure the Russian economy in imitation of the economy of the United States. Entirely on my own time, I have drafted an article on those efforts of

a century ago, and on the parallels to present-day developments in the Soviet Union. More work remains to be done on the article, and I have yet to sell it to a publisher.

5. In addition, early in 1990 I commissioned a translation of the typescript of an article prepared by my great-grandfather in 1898 after he conducted an extensive interview with the writer Leo Tolstoy at Tolstoy's country home, Yasnaya Polyana. The typescript bears the handwritten additions, deletions, and corrections of both Tolstoy and his wife. (The diary of Tolstoy's wife for August 1898 includes mention of an evening spent making these corrections.) It is my intention, as time allows, to write an article discussing both the substance of the interview and the changes and deletions which the Tolstoy's, apparently with a view to avoid offending the Czar's censors, made in the typescript. It is my belief that this article will contain information not previously known to Tolstoy scholars and will make at least a modest contribution to the body of Tolstoy scholarship.

6. I need hardly say that the subject matter of these articles has nothing to do with my work as an attorney for the U.S. Nuclear Regulatory Commission.

7. As I indicated, I have already expended substantial amounts of money (in terms of lost pay) in part so as to be able to pursue these writing projects. Moreover, if I am unable to accept payment for the two projects described above, it may mean that I will be unable to justify further expenses (for example, for travel to the Tolstoy Museum in Moscow) that may be essential if these articles are to be of the quality and completeness I would wish.

8. For the foregoing reasons, I believe that the new statute interferes with my First Amendment rights of free expression and operates to deprive me of property interests in preparatory work—research and writing—that I have already conducted with a view to publishing these

and other non-fiction articles. The statute disserves the public interest to the extent that any such writings may be informative or useful to the public. Moreover, in singling out the non-fiction article for adverse treatment, the statute betrays a forgetfulness of the roots of our First Amendment freedoms. The First Amendment was designed expressly to assure that the writers of non-fiction articles on issues of public concern would be permitted to compete freely in the marketplace of ideas; yet it is the non-fiction article, of all the different types of writing, that this statute singles out for punishment.

9. Thinking that it was important to draw public attention to the pernicious effects of the new law, I wrote an article and submitted it to the *Washington Post*, which printed it on January 6, 1991, under the title, "Arrest Me Officer, I'm Writing" (attached hereto as Exhibit A). On the following day, January 7, I was informed that the NRC's Office of the General Counsel had referred the matter to the agency's Inspector General for investigation. I wrote to the Inspector General the same day, forwarding a copy of the article and mentioning that I planned to donate to charity the \$150 promised me by the newspaper. On January 17, 1991, two agents of the Inspector General interviewed me at length. They asked, among other things, whom I had spoken to at the *Washington Post*, who had written the headline (the newspaper's headline writer, I supposed), and whether I had seen the headline prior to publication (I had not). With all respect to the two agents, whose manner was courteous and professional, I feel that to interrogate me in this way about a published article on a matter of public concern, having nothing to do with my duties on the job, is in itself a substantial violation of my First Amendment rights, regardless of whether it also leads, as the statute provides, to a fine and dismissal from my job.

10. On or about January 23, 1991, one of the agents informed me by telephone that it had been determined that once I received the check from the newspaper, I would be in violation of the law. On February 5, 1991, when the check from the *Washington Post* arrived in the mail, I brought it to the Inspector General's office, and, in the presence of an agent, signed it over to a charity and mailed it. I was told at that time that the matter would shortly be referred to the Justice Department and my supervisors for possible further action. I have not heard anything about the matter since.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 11, 1991.

/s/ Peter G. Crane

PETER G. CRANE

EXHIBIT 2

DECLARATION OF RICHARD DEUTSCH

1. I am an employee of the Voice of America (VOA), the international radio broadcast arm of the United States Information Agency (USIA), in Washington, D.C. I am currently business editor and a senior writer/correspondent on economics. Before becoming business editor in early 1989, I was a general reporter on business for VOA (1987-1989). Before that, I was a Washington-based general correspondent for VOA's Africa Service. My home address is 7306 Maple Avenue, Takoma Park, Maryland, 20912.

2. My current responsibilities at VOA include: tracking and analyzing major economic issues, trade and international business trends; interviewing experts in these fields; writing and reporting on-air about economic news; and writing a weekly 20-30 minute round-up of world business news. These reports are broadcast worldwide in English and in other languages on VOA.

3. As business editor I have played a central role in helping shape the VOA's response to the end of the Cold War and the economic changes gathering momentum around the world. In early 1990, I developed and helped launch a series on how the United States economy works.

4. I have worked for the VOA since 1979. During some periods of time between 1979 and 1987, I worked a 32-hour week (8 a.m. to 3 p.m. shift) and used the rest of the day, many evenings, and weekends to freelance and work for other organizations. I have worked at VOA full-time for the last 3 years.

5. Apart from my employment with VOA, I have served at different times as a Washington correspondent for *Africa Report* magazine, *Development Business* (a twice-monthly UN publication), and Monitor Radio, the

broadcast service of the *Christian Science Monitor*. On vacation, I have often done radio reports for Monitor Radio (for example, from the U.S. west coast and from Jamaica). I have worked part-time for Biznet television news, the cable service of the U.S. Chamber of Commerce, and as an *ad hoc* economics and editorial consultant to the World Bank. Taking a leave of absence from VOA, but still on the rolls as a federal employee, I served as a stringer in 1979 in West Africa for the *Christian Science Monitor*.

6. While an employee at the VOA, but on my own time, I have published about 50 articles for publications as diverse as the *New York Times*, the *Washington Post*, the *Christian Science Monitor*, *Dateline* (the employee magazine of American Express), *Development Business*, *City Paper*, *New Times* (Miami), and *Institutional Investor* magazine. These articles were written on my own time — lunch hours, weekends, vacation time, and so forth — and did not involve the use of government equipment or facilities.

7. A sampling of my more recently published articles includes: "Uruguay Round: Time Running Out," *Institutional Investor* (Sept. 1990); "IMF, World Bank Scramble to Keep Up in Eastern Europe," *Institutional Investor* (Sept. 1990); "Mr. Mitchell Goes to Washington," *Dateline Magazine* (Winter 1990); and "Emerging Equity Markets on the Rise," *Institutional Investor* (Sept. 1989).

8. VOA hired me in 1979 for expertise demonstrated by articles I had written, and assured me that I could continue to publish. I was, in fact, encouraged to publish because this might add prestige to the agency.

9. My outside work has also offered me exposure, flexibility, and the opportunity to build a stronger professional reputation. My annual income from all outside

work has never greatly exceeded ten thousand dollars per annum. Had I not been able to earn this money — as is the case under the new law — I would have produced only a few articles and would have devoted my extra time to other paying work.

10. In the first week of 1991, the managing editor of a national financial magazine asked me to write a lengthy feature article. But because of the honoraria ban I declined, losing one of the best fees I have ever been offered: \$3,000. I later learned that even under the previous law I would have been limited to accepting \$2,000, but that still would have been a substantial amount for me. I would have spent weekends and many evenings producing that article, perhaps one hundred hours. Even the most junior attorney usually does better on an hourly basis, but for me the payment seemed excellent, a reward for years of hard work building a reputation. Ten years ago, I spent countless hours producing articles for an average fee of one hundred dollars. Needless to say the compensation I receive is not only a financial incentive to continue writing, but also a psychological boost to know that my work is appreciated.

11. In February 1991 I declined another editor's request for several shorter pieces.

12. In my writing activities I have had two objectives: to analyze issues for the public and to supplement my income. By removing the economic impetus for writing — by making it an illegal economic endeavor — the honoraria ban acts as a powerful disincentive to exercising my First Amendment rights while remaining a federal employee.

13. Enforcement of the ban is entrusted to a bureaucracy neither trained nor necessarily interested in the preservation of individual rights. Federal guidelines

appear immediately capricious. Richard Werksman, the responsible ethics official in the general counsel's office at USIA (VOA's parent agency), advises me that receiving pay for working as a broadcast journalist on a free-lance basis is permissible — because, he says, reading a script over the air is like performing in a play. But receiving pay for working as a free-lance writer is not acceptable. In other words: if I write a piece and read it over the air, that's okay; but if the same piece appears in print, I'm subject to prosecution. Mr. Werksman says the agency has issued no written regulations specific to its own operations and employees. Instead, it will rely on its own interpretation of the federal guidelines — which are as vague as they are confused.

14. The new law apparently allows me to recover actual travel expenses and certain production-related expenses. Many of the expenses that a freelance writer incurs cannot be recovered as such, however, because they are not project-specific. For example, I have incurred a number of substantial capital expenses. I have purchased a personal computer and various forms of audio equipment, which I use primarily for my freelance writing and speaking activities. I spent several thousand dollars on this equipment with the expectation that I would be able to recover the expenses through my publishing and speaking activities over time. In addition, on many occasions I have travelled to conduct research, not knowing what, if anything, I would be able to publish in the end. Some research trips yield several articles and publication offers, others yield none. Such is the nature of freelance writing. By allowing me to recoup my expenses only if I can link them to a particular compensated piece of work, my unsuccessful research ventures become actual expenses that cannot be recovered. Since I have no way of knowing

whether a research venture will be successful or not, I pay a price overall for my writing activities.

15. It is simply impossible for writers like me to recover all our expenses. The law not only takes away the ability to make a profit, but it also penalizes us financially for engaging in speaking or writing activities. The impracticability of applying the law to writers like myself makes clear that the law does not serve any government interest since the activities that it curtails are clearly activities that pose no danger to the operation of the government.

16. USIA officials say they do not intend to enforce the honoraria ban as long as the issue remains before the Courts and under review in Congress. That, however, could be months or longer. Had the honoraria ban been on the books in 1979, I would not have joined the federal government. If it is not quickly overtuned or rescinded, I intend to resign as soon as I find an appropriate alternative. Because this law removes the financial reward for speaking and writing, it is an inducement not to do so for all but those employees who are independently wealthy.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 12, 1991.

/s/ Richard Deutsch

RICHARD DEUTSCH

EXHIBIT 3

DECLARATION OF CHARLES E. FAGER

1. Since 1985 I have worked for the U.S. Postal Service as a Mailhandler. I am currently earning a salary at the Level 4, Postal Office scale. My home address is 4936 S. 25th Street, Arlington, Virginia 22206.

2. For the past twenty-five years I have been writing on a professional basis mostly on topics related to my church, the Society of Friends or Quakers. Since 1981 I have published a newsletter entitled *A Friendly Letter*. The publication of this newsletter has gained me some prominence in the Quaker community. Consequently, I frequently receive invitations to speak before Quaker groups. I am often offered some small payment for my efforts. It is not much, but enough to supplement my income in a way that makes a difference.

3. My lectures in the past include the following: in January 1991 I gave an address at the Woodbury Friends Meeting in Woodbury, New Jersey; in 1989 I was a major speaker at the Missouri Valley Friends Conference; in 1989 I was also Master of Ceremonies at a Friends Bible Conference; in 1985 I lectured on Martin Luther King at a Quaker Retirement Center; in 1984 I was the main speaker at the Southern Appalachian Yearly Meeting of Quakers; in 1982 I lectured on peace studies at the Earlham School of Religion; in 1980 I was a major speaker at the Consultation on Quaker Service in Richmond, Indiana. In addition, since 1984 I have conducted intensive Bible study workshops at the Friends General Conference.

4. In late 1990 I received an invitation from Guilford College, a Quaker institution in Greensboro, North Carolina, to speak to the Quaker community there on topics related to Quakerism. On March 5, 1991 after the dates and details for this engagement had been finalized, I

wrote to Eugene Hoge, U.S. Postal Service Director for Northern Virginia asking for advice as to whether the honorarium statute restricted this particular appearance. A copy of this letter is appended as Exhibit A. It was only the day before I left for North Carolina that I received an oral response (the written response from Charles D. Hawley, Assistance General Counsel, arrived after I returned from my trip — a copy of this letter is appended as Exhibit B) informing me of the details of the honorarium restriction. I was told that receipt of the \$300 honorarium would constitute a violation of the statute, but I learned from other sources that the honorarium statute did not apply to this particular appearance because I had agreed to make it before the statute went into effect. I was able to receive the \$300 that I had been promised in addition to my travel and lodging expenses.

5. I anticipate that I will receive future offers to speak. I believe having to ask my employer if payment for a particular activity is covered amounts to a screening procedure. This procedure is burdensome and I cannot imagine what legitimate government purpose it serves in the U.S. Postal Service. Furthermore, the restriction on payment acts as a disincentive to continue speaking.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed April 11, 1991

CHARLES E. FAGER

EXHIBIT 4

DECLARATION OF WILLIAM H. FEYER

1. I am employed by the United States Department of Labor, Wage and Hour Division, New York, New York. My home address is 2134 77th Street, Brooklyn, New York 11214.

2. I have been employed by the Department of Labor since 1976. At present, I am Regional Section 14 Specialist for Region II (New York, New Jersey, and the Caribbean), handling all matters relating to sheltered workshops and patient worker programs. Among my other duties, I handle applications for certification of sheltered workshops and patient worker programs in Region II. I coordinate the enforcement program, advise compliance officers and compliance specialists who conduct the investigations, and review their investigation files. I conduct in-service training for operators of sheltered workshops and patient worker programs. I also handle applications for student-learner certificates, which are issued to companies that wish to employ students at rates of pay below minimum wage in order to enable the student to acquire various job skills.

3. In addition to working for the Department of Labor, I am an ordained rabbi, known professionally by my Hebrew name, Zev-Hayyim Feyer. I was ordained in 1977. As a rabbi, I travel throughout the United States and Canada, delivering lectures, teaching classes, and leading seminars and workshops on Kabbalah (the Jewish mystical or metaphysical tradition), Self-esteem, Prosperity, Spiritual Stories, Comparative Religion, and other subjects. These programs are offered at churches, synagogues, and other centers throughout North America.

4. I am typically paid for presenting these programs by the sponsoring organizations. I conduct these programs

during my off-work hours — Sundays, holidays or annual leave. Otherwise, I take leave without pay.

5. In 1990, I presented programs in Alabama, Arizona, California, Colorado, Florida, Hawaii, Mississippi, New York, Ohio, Tennessee, Washington, the District of Columbia, and in the Canadian Province of Ontario.

6. At the time the complaint was filed in this case (December 1990), I had already scheduled an array of appearances for 1991 and early 1992. So far this year I have appeared in North Carolina and Washington, D.C. (February 1991), and in the New York area (March 1991). I plan to appear in New York again in June 1991, and in central Florida in July 1991. In addition, I am tentatively scheduled to appear in Birmingham, Alabama in June 1991, in the San Francisco bay area in December 1991, and at several churches and synagogues in Hawaii in January 1992. I will receive payment for most, but not all, of these programs.

7. I have continued to accept payment for those appearances that I had already scheduled prior to the honoraria ban taking effect on January 1, 1991. My understanding of the law, as interpreted by the Office of Government Ethics, is that commitments for appearances that were entered into prior to January 1, 1991, are exempted from the ban.

8. With respect to appearances that I have scheduled since the ban took effect, I intend to ask the sponsoring institutions to hold any payments (in excess of my actual expenses) in an escrow account until such time as the uncertainties regarding the law are clear.

9. At present, I am continuing with my rabbinic activities on the assumption that the absolute ban on honoraria will be struck down by the Court or amended by Congress. If the ban remains in effect, however, I will be

compelled to choose between my job with the federal government and my duties as a rabbi. This result directly and unnecessarily infringes upon my freedom of speech and religion.

10. This result also contravenes the Department of Labor's own long-standing policy — which was in effect when I took my job in 1976 — of actively encouraging its employees to engage in outside speaking and writing activities. (See 29 C.F.R. § 0.735-11.) I feel as though an important condition of my employment with the government has been altered, without my input (much less my consent). The law banning honoraria creates a real disincentive to continue speaking for those who cannot afford to give up their government jobs. It also creates a real disincentive to work for the federal government for those who wish to continue to speak.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 9, 1991.

/s/ William H. Feyer

WILLIAM H. FEYER

EXHIBIT 5

AFFIDAVIT OF THOMAS C. FISHELL

1. I am employed by the Internal Revenue Service as a GS-8 tax examining assistant at its District Office in Dallas, Texas. I have worked for the IRS since January 9, 1984. I am currently chief steward and executive vice president for National Treasury Employees Union Chapter 46 in Dallas.

2. I am also a self-employed ordained and licensed minister of the Southern Baptist Convention. I was licensed in 1980 and ordained in 1981. I have the right to perform weddings and funerals and to deliver sermons in the Baptist Church.

3. I deliver sermons at various Baptist churches in the area as requested. I also conduct funerals and weddings. I speak at special weekday meetings at churches on religious topics or on subjects relating to church administrative matters. These include church staff training sessions on subjects such as use of computer software and the running of Sunday School programs. Occasionally, I travel to Michigan, my home state, to conduct services or a wedding or funeral. I receive fees for these religious duties.

4. I have recently learned that Congress has prohibited federal employees from receiving "honoraria" for speeches, articles, and appearances, effective January 1, 1991. I believe that this will cover the fees that I receive for religious services, weddings, funerals, and speaking engagements.

5. I have already committed myself to speak or conduct weddings at various dates after January 1, 1991. I have not decided whether I would break these commitments if I were not able to accept fees for them.

6. I will cease accepting most invitations and severely curtail my speaking and most other activities as minister if the ban on acceptance of honoraria remains in effect. I cannot afford to perform these activities without recompense.

7. The likelihood that the ban will remain in effect has made me reluctant to accept engagements now for dates after January 1, 1991. Since I learned of the ban, I have only tentatively accepted some engagements and have postponed making commitments as to other engagements. This uncertainty as to whether I will be able to perform my religious duties is imposing a hardship on me, because I need to know what my schedule will be. It will also impose a hardship on couples who will want me to officiate at their wedding, because I will have to tell them that I do not [know] whether I will be able to perform the ceremony.

8. In about 1984, I received permission from the IRS to engage in my activities as minister. I estimate my 1990 net income from these activities to be about \$1000.

I declare under penalty of perjury that this statement is true and correct to the best of my information and belief.

Date: 12-3-90.

/s/ Thomas C. Fishell

THOMAS C. FISHELL

EXHIBIT 6

SUPPLEMENTARY AFFIDAVIT OF THOMAS FISHELL

1. I am an individual plaintiff in this litigation, and have filed a previous affidavit dated December 3, 1990. I am an Internal Revenue Service employee and an ordained part-time minister.

2. In my capacity as a minister, I am called upon to give paid guest sermons during worship services conducted by other ministers, to perform weddings and funerals for compensation, and to make other compensated speeches to church groups on religious topics and church administrative subjects.

3. In the period since January 1, 1991, the effective date of the provision of the Ethics Reform Act which prohibits the acceptance of compensation for certain categories of writing, speaking and public appearances, I have been forced to curtail my First Amendment activities. I have cancelled a guest sermon because I could not accept compensation under the terms of the Ethics Reform Act and implementing regulations. Because I have made it known that I am unavailable for weddings and funerals, I am no longer receiving requests to perform them. I expect to continue declining requests to perform these services as long as the ban on compensated speech remains in effect.

4. I believe that I am entitled to compensation for the time and effort that I spend preparing and delivering sermons, conducting religious services, and giving speeches. The expenses associated with my work as a clergyman do not only include such day-to-day expenses as travel, typewriter paper, and the like, but also involve considerable capital investments that are not compensable

under the Ethics Reform Act. For example, I have already spent four years pursuing my theological education, and anticipate spending another year or two doing so, at considerable financial expense. I have invested approximately \$2000 in word processing equipment. I also maintain an extensive library of religious commentaries, annotated biblical texts, multi-volume encyclopedic sets, and related scholarly materials, which are necessary research materials as I prepare my sermons. I estimate that I have spent \$2000 in collecting these materials, including more than \$400 on books I would not have bought but for my work as a minister. I must continually add to these materials, particularly cumulative encyclopedic texts, as new texts and supplements become available. The Ethics Reform Act would force me to absorb these capital costs permanently, and forgo the tax benefits of capital depreciation, as the price of continuing my uncompensated expressive activities.

5. While the inability to defray my capital investment in my part-time work as a clergyman is a crucial imposition resulting from the Ethics Reform Act, my incentive to continue investing time in this work is also substantially reduced by the ban on compensated expression. The time I spend preparing and delivering religious services and speeches could readily be invested in a profitable activity, such as working overtime at the IRS. Because I would be entitled to accept payment for these activities in the normal course of affairs, and because the law imposes economic disadvantages on me for choosing speech over some other activity, I believe the ban constitutes an affirmative penalty on my choice to engage in First Amendment activities, as surely as it would if I had been taxed on the income produced through my work.

I affirm on penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Thomas Fishell

THOMAS FISHELL

Date: 4/5/91

EXHIBIT 7

AFFIDAVIT OF CHARLES GIUNTA

1. I am employed by the United States Customs Service as a Customs Inspector in El Paso, Texas. I am a member of the National Treasury Employees Union and the President of NTEU District 116, which consists of 33 NTEU chapters west of the Mississippi River. I am also a member, Chief Steward, and former President of NTEU Chapter 143, representing Customs employees in El Paso. A President of District 16 and Chief Steward at Customs in El Paso, I continue to be responsible for overseeing and directing the operations of Chapter 143.

2. The function of NTEU chapters is to provide representation and services to bargaining unit members at the local level. These activities include collective bargaining, grievance arbitration, and filing unfair labor practice complaints. Such activities also include organizing concerted action by bargaining unit employees, such as demonstrations, letter-writing campaigns, and lobbying. Further, NTEU chapters perform the important function of making employees aware of their legal rights, notifying them of important opportunities and deadlines, and keeping them abreast of union activities on the local and national levels. NTEU chapters also hold elections to select chapter officers and representatives to national NTEU activities, and hold meetings to determine future activities and discuss the chapter's position with regard to actions taken by management.

3. To perform the functions described in paragraph 2 adequately, my NTEU chapter must have a newsletter to

communicate with bargaining unit employees. Such a newsletter serves as the union organ, alerting bargaining unit members to union and management activities, commenting on political issues affecting employees, notifying them of important dates and deadlines, announcing union meetings and elections, and describing employee rights and opportunities for advancement. The newsletter is also a means for Chapter 143 to inform employees of the official position taken by the chapter with respect to matters of concern to bargaining unit members.

4. During my tenure as President of NTEU Chapter 143 and NTEU Region 16, Chapter 143 has published a monthly newsletter. At first, Chapter 143 attempted to assemble its newsletter by soliciting voluntary contributions of articles and information from chapter members. Unfortunately, because Customs workers in our chapters usually work long shifts and have little spare time or energy to devote to extracurricular activities, and because some employees feared management retaliation, it was not always possible to find authors to cover all the stories that needed to be included in the newsletter. In addition, assigned stories were often turned in late, delaying publication of the newsletter and frequently making other time-sensitive announcements in the newsletter "stale." Finally, the quality of the writing that resulted from this voluntary contribution system was often inconsistent. As a result of this inadequate level of voluntary participation, the newsletter failed to publish regularly and was dropped altogether on several occasions, most recently about a year ago.

5. Shortly thereafter, Chapter 143 launched renewed efforts to produce a newsletter. To avoid the difficulties associated with publication of the earlier newsletter, Chapter 143 arranged with a Customs employee, who was also a talented writer, to write the newsletter. He typically devoted ten to twenty hours each month to writing articles for the newsletter, and was compensated at the flat rate of \$100 per month. While there was no contract between Chapter 143 and individual employee, we paid him the flat fee for each month he wrote the newsletter. Other employees were still welcome to submit contributions to the newsletter. However, by relying on the paid services of one individual, we were able to assure the regular, timely publication of a comprehensive, well-written, and well-informed newsletter for use by the chapter and its members.

6. The individual we paid to write our newsletter was not a salaried employee of the chapter and did not have a continuing contract with it. He stood as an independent contractor in relation to Chapter 143, and he was under no obligation to write the newsletter in any successive month.

7. Chapter 143 recently learned that Congress has prohibited federal employees from receiving "honoraria" for speeches, articles, and appearances, effective January 1, 1991. We believe the prohibition prevents federal employees from accepting money for writing newsletters such as our chapter's publication.

8. When we advised our newsletter writer of the new law, he declined to continue writing the newsletter without compensation. Personally, and with the help of other chapter officers, I engaged in an extensive search, including personal requests, for Customs employees who

would be willing to write the newsletter on a regular basis without compensation.

9. When we were searching for a new writer, we considered it essential that he or she be a Customs employee and a skilled writer. There were several reasons why this was important. First, it was necessary to retain an individual who would be intimately familiar with technical issues involving Customs employees and the particular problems they confront. Chapter officers and members do not have time to explain these details to non-Customs employees unfamiliar with their complexities. Second, Chapter 143 has a limited budget, and was unable to afford the rate of pay necessary to retain an outside writer for its newsletter. Finally, we considered it essential for the credibility of the newsletter as a union organ and as the voice of the workers that it be seen as the product of Customs employees' time and effort, not the product of a "hireling" from outside the Customs Service. We were unable to find any qualified writer, employed by Customs, who was willing to write the newsletter without compensation. We also found no qualified individual outside of Customs who was willing to write the newsletter for a fee that was within our chapter's budgetary constraints. Because we were unsuccessful in this search, the Chapter 143 newsletter has not been published since the December 1990 issue.

10. Chapter 143 has been seriously harmed by the discontinuation of its newsletter. With the loss of its publication, the chapter has effectively been deprived of its "voice." Communications with workers have become quite laborious, for they are now entirely dependent on the frequent circulation of reproduced memoranda and notices. They have also become considerably less effective.

I therefore believe that the honoraria ban constitutes a serious burden on the speech of the chapter, as well as that of individuals who would otherwise be paid to write on the chapter's behalf.

11. If NTEU or some other plaintiff is successful in obtaining declaratory and injunctive relief prohibiting the government from enforcing this prohibition on honoraria, Chapter 143 will immediately resume the practice of paying Customs employees for writing its newsletter. If such relief is unavailable, it appears that we will be unable to recruit regular writers for this publication.

I declare under penalty of perjury that this statement is true and correct to the best of my information and belief.

Charles Giunta

CHARLES GIUNTA

Date: 4/9/91

EXHIBIT 8

DECLARATION OF ROBERT A. GORDON

1. I am an Aerospace Engineer and have been employed in such capacity at the Goddard Space Flight Center in Greenbelt, Maryland for the last twenty-two years. I am currently earning a salary at the GS-13 level. My home address is 1667 Webster St., N.E. Washington, D.C. 20017.

2. For the past five years I have given various lectures on subjects related to Black History, which is an area of great interest to me.

3. In January of 1991 I received an invitation by the Maryland Institute of Art to give two lectures on Black History. I also have received recent invitations to give lectures on the same general subject at the University of Maryland and at Savannah State College a unit of the University System of Georgia. My fee is normally \$100 per lecture.

4. On February 14, 1991 I sent a memorandum to Lawrence F. Watson, Chief Counsel at NASA, requesting an interpretation of the Ethics Reform Act of 1989 to see if I could receive payment for my speaking activities. A copy of this memorandum is appended as Exhibit A.

5. On February 15, 1991 I received a response from Mr. Watson informing me that any payment I received above "actual and necessary travel expenses" would be considered to be in violation of the statute. A copy of this response is appended as Exhibit B.

6. On March 6, 1991 I gave a lecture on Black Seminole Warriors and on March 13, 1991 I gave a lecture entitled "The Glory and The Shame" which was a critique of the movie "Glory." Both of these lectures were delivered at the Maryland Institute of Art and I was promised payment of \$100 for each of them.

7. I asked Professor Lenora Foerstel of the Maryland Institute of Art to hold my payment checks until this litigation is decided. Professor Foerstel informed me that the Maryland Institute of Art could not hold the checks for me. A copy of this response is appended as Exhibit C.

8. On April 6, 1991, I received a check for \$200 by mail from the Maryland Institute of Art in payment for the lectures.

9. On April 10, 1991 I hand delivered a request to Mr. Watson at NASA to hold the check in his capacity as Chief Counsel, until this litigation is resolved. A copy of this letter is appended as Exhibit D.

10. On April 10, 1991 by "Telemail", Mr. Watson informed me that his office could not accommodate my request. A copy of the Telemail message is appended as Exhibit E.

11. At about noon of April 10, 1991 the check was deposited in a Citizens Bank of Maryland "ESCROW FOR LECTURES" account. A copy of the account is appended as Exhibit F. Mr. Watson's Telemail response seemed to indicate that depositing the check in the escrow account would still be a violation of the statute. However, I made the deposit in a good faith reliance on the opinion of the Court of Appeal in this litigation, which endorsed the escrow account approach.

12. I understand that under the law I am entitled to recover "actual and necessary travel expenses". Although Mr. Watson did not so inform me in his February 15 memorandum, I now understand through my attorney that I can also recover expenses in the nature of typing, editing and reproduction costs. I have not saved receipts for these kinds of expenses in the past and for the most part it is simply burdensome to do so. In the future I will have to save receipts of photocopies and the like. I also

plan to prepare some video presentations, but I do not know if the cost of the tapes and the editing can be included as an expense.

13. In any event, the expenses outlined above only constitute part of the varied expenses that I incur in preparation for my speaking activities. For example, in preparing for my critique of the movie "Glory," I went to Boston to visit the "54th Massachusetts/Col. Shaw" memorial and to research some historical documents. Perhaps this could be characterized as a "necessary travel expense", but I plan to give more than one lecture on this subject. How am I to apportion the amount spent on my trip to Boston? Basically, it is often impossible to tie research expenses to a specific lecture. Normally the research for a speech is conducted in considerable advance before the speech is given.

14. Given the subject matter of my lectures I often have to pull together non-traditional research sources. This requires a great expenditure of time and effort. The expenditure of this time and effort at the expense of other activities with my family or otherwise is an expense that I feel should be compensated if I find an audience that is willing to pay to listen to the fruits of my research. I feel that I am making a contribution by researching areas that have in the past been ignored and offering the results of my research to others. (Note the copy of the response of Dr. Hanes Walton, Jr. author of "Invisible Politics" - Black Political Behavior, appended as Exhibit G). The new law disallowing compensation for my efforts is a disincentive to continue engaging in these activities. My expenses are often intangible or difficult to tie to a particular speech activity, so this law leaves me with a non-compensated loss for speaking.

15. I have not reduced my speaking activities to date.

but I am working on the expectation that the law will soon be declared unconstitutional or changed by Congress. If the inability to receive payment for my speech activities becomes a permanent situation I will have to significantly reduce my activities. As an example, I would like to visit the Seminole reservation in Oklahoma to continue my research on Seminoles, but I cannot pay for this out of the money on which my family depends. I need to be able to save some money from my speaking activities to be able to fund this research trip. Under the current law I will never be able to pay for this trip, thus I will not be able to speak to others about it. In a similar fashion the absence of money from which to fund other research activities will significantly reduce my speaking activities.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed April 11, 1991

Robert A. Gordon

ROBERT A. GORDON

EXHIBIT 8

AFFIDAVIT OF JAN ADAMS GRANT

1. I am employed by the Internal Revenue Service as a GS-7, Step 4 tax examining assistant at Ogden Service Center. I was placed on seasonal non-duty, non-pay status as of October 23, 1990, but I expect to resume duty status in January 1991. This is my first seasonal furlough in almost two years. I have been employed by the IRS for five years and am a career-status employee. I am a member of the National Treasury Employees Union.

2. I have a master's degree in geo-physics from Utah State University.

3. In my non-work time, I write non-fictional articles for publication in magazines. I have published articles in such magazines as *Woman's Day*, *Sierra*, and *Camping Today*. These articles concern such subjects as outdoor activities and environmental issues. One article that I am currently proposing to write concerns the reintroduction of wolves into Yellowstone National Park.

4. My normal practice is to prepare a "query letter" proposing an idea for an article. I submit the query letter to a magazine publisher. If the publisher is interested, he will write me a letter stipulating the payment terms, the magazine and issue in which the article will appear, and the date by which the article is to be submitted. After I reply, accepting the terms of the letter, we have a binding agreement. I am usually paid per word, upon submission of the article and acceptance by the publisher. The publisher refuses to accept the article only if it fails to meet his editorial standards or if the viewpoint of the article

does not fit the magazine's philosophy. This is very rare; I have never had a submitted article rejected.

5. I currently have four query letters outstanding, waiting response from a publisher. If one or more is accepted, the article(s) would appear after January 1, 1991. Publishers usually expect delivery of an article from one to six months after agreement is reached on the writing of the article.

6. I have also written a humor article entitled "Greenhorn Backpacking," which I have submitted to *Camping Today*. I am waiting to hear if the magazine will accept the article.

7. I am writing a book of fiction, with some factual basis, that I have tentatively titled *The Green Shovel*. I have submitted three chapters to a publisher, Morrow & Son, and am waiting for their response. I am anxious to publish as many articles as possible because I believe that it is easier for an author to sell a first book to a publisher if he or she has published widely in magazines.

8. I also deliver speeches to local church groups on earthquake preparedness. I am currently accepting speaking engagements for dates following January 1, 1991.

9. I receive income from my articles and speeches. I estimate that I will receive approximately \$3000 from my writing and speeches in 1990. I have received permission from the IRS to engage in this activity because there is no possibility of conflict with my duties for the IRS.

10. I have recently learned that Congress has prohibited federal employees from receiving "honoraria" for speeches, articles, and appearances, effective January 1,

1991. I believe that this prohibition will cover the money that I receive for my articles and speeches.

11. I would not continue to write articles and deliver speeches if I were not able to accept money for those activities. I cannot afford to write if I cannot even be reimbursed for the expenses that I incur in connection with researching and writing my articles. If forced to choose between my free-lance article writing and public speaking career and my job with the IRS, I would have to give up the former. I do not yet earn sufficient income from writing to permit me to resign my job with the IRS and write full-time.

12. If I were compelled to end my writing and speaking career, I would lose the intellectual pleasure, as well as the additional income, that I receive from those activities. I also believe that I would hurt my prospects of securing a publisher for the book I am currently writing.

13. The existence of this law has already affected my writing career. I am not submitting new query letters because I do not know whether I will be able to fulfill my part of the agreement. I certainly do not want to breach an agreement with a publisher. Therefore, if a publisher responds favorably to one of my outstanding query letters, I will have to tell that publisher that I am unable to write the article. Publishers do not tolerate delay and will not permit me to postpone writing the article.

14. Because I expect the prohibition on honoraria to go into effect on January 1, 1991, and that I will no longer be able to enter contracts to write articles after that date, I have stopped researching new ideas for articles. This enforced period of inactivity is particularly difficult for me

because I had planned to devote my temporary furlough period to my writing. I believe that this period of inactivity will have long-term harmful effects on my writing career. Ideas that I have developed and researched will no longer be timely and therefore will not be acceptable to publishers, who look for articles that are topical. Because researching ideas, developing query letters, submitting ideas to publishers, awaiting their agreement, and writing the articles is such a lengthy process, I will have a significant gap in my schedule that will affect me for many months after enforcement of this statute is enjoined or the statute is amended by Congress. The longer the time until relief is provided, the longer the gap in my schedule and the more pervasive and lingering its effects, of course.

15. If NTEU or some other plaintiff is successful in obtaining a preliminary injunction prohibiting the government from enforcing this prohibition on honoraria, I will immediately submit query letters with proposed ideas for articles and resume my research. For example, if the injunction is granted, I would be able to travel to Yellowstone National Park on January 14, 1991, as I had originally planned, to research a proposed article on the reintroduction of wolves there. I also expect to enter into agreements to publish my articles while the preliminary injunction is in effect. I would continue to work on future articles at my regular pace because I would expect the injunction to be made permanent. If the injunction is not granted, I will not resume my research and writing; there would be no point in traveling to Yellowstone and investing the money in research if I cannot be sure I would at least recoup my expenses.

I declare under penalty of perjury that this statement is true and correct to the best of my information and belief.

Date: 12-13-90

/s/ Jan Adams Grant

JAN ADAMS GRANT

EXHIBIT II

DECLARATION OF JUDITH L. HANNA

1. I am an Education Program Specialist for the United States Department of Education ("ED") in Washington, D.C. I hold a Ph.D in anthropology from Columbia University, an M.A. in political science from Michigan State University, and a B.A. in political science from UCLA. My home address is 8520 Thornden Terrace, Bethesda, Maryland, 20817.

2. I have been employed by the ED since September 25, 1989. As an Education Program Specialist, I write on issues involving national education goals. Specifically, I am currently working on two book projects that I proposed to the ED in November of 1989: *Dropout Prevention, Literacy, and the Performing and Visual Arts*, and *Tough Cases: School Outreach for At-Risk Youth*. As their titles imply, these book projects are concerned with the national goals of dropout prevention and academic improvement. As a result of my work in conjunction with these projects, I have been invited to lecture in Minnesota, Colorado, and North Carolina before University faculty, administrators, school superintendents, and representatives of arts and community organizations. If I had not been speaking on my ED work, I would have received a \$500 honoraria in addition to travel and per diem expenses.

3. Before joining the ED in 1989, I was a high school teacher, university professor, researcher and consultant for in-service programs for teachers and administrators. Since 1965, I have been invited by various individuals and groups to speak, write and consult on matters about which I have developed expertise through my education, research, and experience. To date, I have written and had published six books and more than 75 articles. I have also written many scholarly papers, presented lectures at more than 24 universities, and served as a consultant/reviewer

of grant proposals, publications, and foundations. I have received honoraria in amounts ranging from \$75 to \$650 for my lectures.

4. Outside of my ED work and using my own resources, I frequently engage in research, writing, and consulting activities for remuneration. Current ED rules permit me to work 10 hours per week for pay. I have received ED approval for my consulting activities and for my outside writing in the areas of anthropology, ethnomusicology, dance ethnology, racial tension on college campuses, and gender.

5. As stated above, I have written six books. The most recent include: *Life, Death, and the Women's War: Africa Ubakala Igbo Dance-Plays* (under review, recommended for publication); *Dance and Stress: Resistance, Reduction, and Euphoria* (AMS Press 1988); *Disruptive School Behavior: Class, Race and Culture* (Holmes & Meier 1988); and *Dance, Sex, and Gender: Signs of Identity, Dominance, Defiance, and Desire* (University of Chicago Press 1988).

6. In the past two years (1989-1990) I have also published 11 scholarly or popular articles for which I received compensation. ED approved my writing of such articles, which appeared in journals and newspapers as diverse as *Update USA* (1989), *Dance Teacher Now* (1989, 1990), and *The Washington Post* (1989). In addition, an article that I wrote comparing Nigerian and modern dance was published in an edited compilation of articles entitled *Women and Social Protest* (Oxford University Press 1990), and I contributed articles to the *Grove/Norton Handbook of Ethnomusicology* (1991), *Dance, Gender and Culture* (1991), and *International Encyclopedia of Dance* (1991).

7. In 1991 I expect to receive payment for an article

that will be published as a chapter in the book *Popular Music and Communication* (1991).

8. If an article I write is "project-specific" or directly related to my work for the ED, I do not accept any compensation for its publication. This is in accordance with current ethics regulations, and is unrelated to the restrictions imposed by the honoraria ban.

9. In the past, writing and publishing articles has always been an integral part of my work. Articles related to the subjects of my books can be published in a relatively short period of time, and they often elicit helpful feedback that allows me to improve an upcoming book and to publicize it as well. Articles published after a book is released stimulate the readership, pique the curiosity of those who might not otherwise buy the book, and convey my ideas in condensed form to specific readers who may only read the book material in that form.

10. The honoraria ban has discouraged me from writing and publishing articles, however. Since the ban took effect on January 1, 1991, I have undertaken *no* initiatives to publish any new articles. In addition, I recently turned down an opportunity to co-author an article. I would have readily accepted such an opportunity in the past.

11. The fact that I can no longer get paid for writing articles is absolutely a disincentive for me. I would rather devote my time and energies to other projects for which I can still receive compensation, such as the writing of books. It makes little sense that the law now permits me to receive royalties from books, while it does not allow me to receive payment for articles written on the same topics.

12. I have been informed that the law banning honoraria would allow me to recover "actual and necessary travel expenses" and "actual expenses in the nature of typing, editing and reproduction costs." These

exceptions do not remove the harmful effects of the law. Allowing the recovery of "expenses" does not account for the value of my time, or the fact that I could have spent it pursuing income-earning activities. In addition, not all "expenses" involved in writing an article are in fact recoverable. As a minor example, it would be quite difficult to attribute with any accuracy what percentage of my computer ribbon was used to produce any particular article. Moreover, some articles take years to write. It would be nearly impossible to calculate with any accuracy the "actual expenses" involved in such an effort. In any case, the notion that I would be required to save my receipts and document in detail my production-related expenses in order to break even (at best) is itself a disincentive to any such effort. I am much more inclined to engage in activities that do not necessitate jumping through such hoops.

13. Under the current ban on honoraria, I also will not accept any speaking engagements. The preparatory time and travel time entailed thereby are better spent on income-producing efforts, such as writing books.

14. The ban on honoraria causes unnecessary injury to me as a federal employee and to those whom my writing and speaking assists. I joined the ED at a time of strong interest in educational reform, with the desire to apply my knowledge and expertise at the national level. My mentor, Margaret Mead, encouraged her students to pursue public service; scholars should not simply address one another, she argued. ED policy does not discourage outside scholarly activities; some supervisors encourage it. However, the ban on honoraria discourages scholars like me from speaking and publishing as extensively as in the past, thereby detracting from the intellectual capital of the country.

15. The honoraria ban also causes me harm that is not

directly financial. A scholar's professional reputation depends on continued productivity. I am less productive now than before the law took effect. It is as though I am being penalized just for being a federal employee.

16. I did not expect to lose my First Amendment rights just by entering government service. Nor did I expect that my joining the government would infringe my right to share my knowledge with those who ask, or reach out to those who need or request my assistance. I have received public education at some of the finest universities. In addition, I have received public education and foundation support for my research. Consequently, I believe I should have the freedom to use this experience to contribute to knowledge, both within and without the scope of my federal employment.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 10, 1991.

/s/ Judith Lynne Hanna

JUDITH LYNNE HANNA

EXHIBIT 12

DECLARATION OF DR. GEORGE J. JACKSON

1. I am a microbiologist for the Food and Drug Administration, United States Department of Health and Human Services. I hold a Ph.D. in microbiology from the University of Chicago. I have been employed at the FDA since 1972. My government grade level is GS-15. My address is 1435 Fourth Street, S.W., Washington, D.C., 20024.

2. My secondary profession is that of a dance writer. My interest in dance goes back to my childhood when I was an ice figure skater. I began to write about dance—reviews of performances and historical essays—in college, was first published by my college newspaper in 1951, and was soon asked to contribute pieces to professional publications. I have continued to do so. Currently, the two principal publications for which I write are the *Washington Post* and *Dance Magazine* (New York). I have written regularly for the *Post* since 1978, and for *Dance Magazine* since 1985. On occasion, I write or edit for other dance publications, lecture on dance for universities and the Kennedy Center, and do radio and television broadcasts on dance.

3. Some of my more recent articles in the *Washington Post* include: "Miami City Ballet" (April 8, 1991); "Dorothy Hamill and the Next Ice Age" (April 4, 1991); "Variety Without the Spice" (Dec. 11, 1990); "Ailey Troupe's Class Act" (Nov. 5, 1990); "Tableaux of Russian Ballet" (Sept. 8, 1990); and "Men on a Pedestal: Miami's Male Dancers Star in Balanchine" (Aug. 11, 1990).

4. I write dance articles as frequently as two per week. Although the money I receive is not insignificant, more important than the money is that I enjoy dance immensely. In addition, keeping the tight deadlines of a paper like the *Post* or lecturing on this topic provides wonderful training and discipline that helps me substantially in the writing and speaking aspects of my FDA assignments as a microbiologist.

5. Before the honorarium statute went into effect, I was paid for my articles. I was also paid for some, though not all, of my speaking appearances. Relative to my government salary, I did not earn a great deal of money from this endeavor—no more than \$3,000 annually.

6. I very much want to continue to write and lecture about dance. In fact, I would probably continue to do so even without pay. However, the Washington *Post* informed me at the end of last year that they could not accept my articles for publication if they were simply "donated." Moreover, the Dance Critics Association, of which I am a current member and past President, strongly discourages its members to write for no pay. As a result of the honorarium ban I did not write for a period of three weeks, missing the opportunity to publish at least three or four articles.

7. On January 24, 1991 I was told by Allan M. Kriegsman, Chief Dance Critic of the *Post*, that I could resume writing for the newspaper and I would not get paid at the time. Mr. Kriegsman made it clear that this was only a temporary decision and that it was based on the possibility of a change in the law.

8. Because the *Post's* decision is temporary, I am still uncertain as to my future relationship with the newspaper if the honoraria ban is not suspended by this Court or changed by Congress.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 11, 1991.

/s/ Dr. George J. Jackson

DR. GEORGE J. JACKSON

EXHIBIT 13

AFFIDAVIT OF SHARON KENNEDY

1. I am employed by the Department of Health and Human Services as a GS-11 Equal Opportunity Specialist in Washington, D.C. I have worked for HHS since 1978. I am a member of the National Treasury Employees Union.
2. In my spare time I engage in freelance writing in a variety of contexts. I write reviews of art shows, musical performances, stage plays and dinner theatre for local and city newspapers, including the Washington Post, Washington Times, Manassas Journal, Prince Georges Journal and Montgomery Sentinel. Frequently I write two reviews a week. I engage in this activity because I consider myself a serious writer, and I find that this form of writing enables me to cultivate and enhance my skills in a way that work-associated writing cannot.
3. I also write public relations copy and press releases for local businesses, which are published in local and regional newspapers. I engage in this enterprise as a small business, and when I file my tax returns, I report income and avail myself of all tax advantages associated with my freelance writing.
4. I am compensated for my writing in several different ways. For my critical reviews of art, music and theatre, I ordinarily receive complimentary admission for myself and a guest. If I am doing a dinner theatre review, I also receive complimentary dinner for myself and a guest. In addition, I am often paid a fee by my publisher for art or performance reviews submitted. Further, I receive fees for writing public relations copy for small businesses for local publication. In all, I would estimate that I receive \$1500.00 annually in fees and another \$1500.00 in free theatre admission and meals in exchange for my writing. I have also received numerous awards for my writing.

5. My writing is also important to my primary career activities. I have applied for positions with the Voice of America and with the Equal Employment Opportunity Commission that entail professional writing. I am informed that because of my outside writing activities, I may be considered for positions at GS-13 instead of my current level, GS-11. This would be very advantageous to me financially.
6. I have recently learned that Congress has prohibited federal employees from receiving "honoraria" for speeches, articles, and appearances, effective January 1, 1991. I believe that this will cover the compensation I receive for my various writing activities.
7. Aside from the outlay of personal time and effort, my writing entails considerable financial outlay. For example, in order to cultivate clients for my public relations writing, I must maintain memberships in the Prince Georges County Chamber of Commerce and the Prince Georges County Public Relations Association. My annual fees for these two memberships are \$250.00 and \$30.00, respectively. Of course, if NTEU or another plaintiff is unable to obtain in order enjoining the government from enforcing the honoraria provision of the Ethics Reform Act, I will be unable to accept complimentary admission to the artistic and theatrical events that I cover, and any continuation of my writing would entail that additional expense.
8. I cannot afford to pay admission to all the artistic and theatrical events I cover or to continue paying associational membership fees if I cannot recover compensation for my writing. Therefore, if the honoraria provision of the Ethics Reform Act is allowed to take effect, I will be forced to stop writing. Otherwise, I plan to continue writ-

ing and anticipate several commitments in January 1991.

I declare under penalty of perjury that this statement is true and correct to the best of my information and belief.

Date: 12/27/90

/s/ Sharon Kennedy

SHARON KENNEDY

EXHIBIT 14

SUPPLEMENTARY AFFIDAVIT OF SHARON KENNEDY

1. I am an individual plaintiff in this litigation, and have filed a previous affidavit dated December 27, 1990. I am an employee of the Department of Health and Human Services, and I also operate a home public relations business. This entails writing press releases, promotional copy, newsletters, resume portfolios for performing artists, and theatrical and artistic reviews.

2. Business clients and publishers always pay for my professional writing. Because of widespread professional norms in the writing, public relations and publishing industry, many of the publications that print my work have a policy of publishing only articles for which they have paid an honorarium. I am not employed by any of the publishers that pay me for my writing. I accept contractual arrangements with business clients for my writing services.

3. In the period since January 1, 1991, the effective date of the provision of the Ethics Reform Act which prohibits the acceptance of compensation for certain categories of writing, speaking and public appearances, I ceased accepting compensation for my writing and speaking. I have continued to write, in order to protect my credentials, with a view to resuming my compensated writing if and when the law is struck down. If the law is not struck down, and I can no longer accept compensation for my writing under the terms of the Ethics Reform Act and implementing regulations, I will be forced to close my

professional writing business and research possibilities to take up some more profitable activity.

4. As a professional writer, I believe that I am entitled to compensation for the time and effort I spend in researching and preparing my written work. The expenses associated with this activity do not only include such day-to-day expenses as travel, typewriter paper, and the like, but also involve considerable capital investments that are not compensable under the Ethics Reform Act. For example, I have made extensive investments in word processing equipment and training in furtherance of my writing business. In 1988, I invested \$1912 in IBM computer equipment and \$434 in furniture for my home office. In 1989, I spent \$889 on an IBM printer. In 1990, I spent an additional \$1915 on computer hardware and software. This year, I have already invested an additional \$1700 in a replacement computer. I have also spent \$598 (and considerable personal time) on noncredit coursework to acquire and sharpen my skills in word processing and computer applications, and expect to spend an additional \$400 to \$500 for continuing coursework. In addition, I have invested approximately \$1500 since 1988 in maintaining a home library of books and journals related to the subject matter and applications of my writing, including books on art and theatre, public relations materials, and writers' market publications. I anticipate additional annual expenditures of \$200 to \$300 maintaining such a library. The Ethics Reform Act would force me to absorb these capital costs permanently, and to forgo the tax benefits of capital depreciation, as the price of continuing my uncompensated expressive activities.

5. The compensation I receive for writing has also helped subsidize the improvement of skills necessary for my work as a writer, which have, in turn, expanded my opportunities for career improvement at HHS. For example, through writing as a business activity, I have learned the difference between the accepted standard of business writing and government writing styles. Further, the courses I have taken in word processing and computer applications have made me eligible for a career change to computer support specialist positions, which could result in a two-grade increase in pay. I have also received a cash award from HHS for expanding use of software applications for the agency. My home business as a professional writer has enabled me to set aside the time I need to develop the skills necessary for this.

6. While the inability to defray my capital investment in my professional writing activities is a crucial imposition resulting from the Ethics Reform Act, my incentive to continue investing time in this work is also substantially reduced by the ban on compensated expression. The time I spend preparing written work could readily be invested in a profitable activity, such as working overtime at HHS. Because I would be entitled to accept payment for these activities if the government had not determined to regulate this field, and because the law imposes economic disadvantages on me for choosing speech over some other activity, I believe the ban constitutes an affirmative penalty on my choice to engage in First Amendment activities. I have often been struck by the legal and social structures, and the many layers of review and revision, that have prevented me from speaking my mind in my government

workplace, where my writing is ultimately the property of my employer. By contrast, I have always enjoyed the flexibility to say what I think in my professional writing, and I have derived great pleasure from the recognition this has brought me in the form of professional awards and monetary compensation. I am offended that the government is now reaching out to stifle my expressive activity outside the workplace.

I affirm on penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Date: 3/25/91

/s/ Sharon Kennedy

SHARON KENNEDY

EXHIBIT 15

DECLARATION OF EDUARD MARK

1. I received my Ph.D in American History from the University of Connecticut in 1978. I have been employed by the Department of the Air Force as a historian since August 1981. My chief responsibility has been to perform historical research on subjects of interest to the Chief of Staff, United States Air Force, and the Air Staff. In the course of my work for the Air Force I have written many specialized studies and two books. Various particulars regarding my education and professional accomplishments are stated in my curriculum vitae; a copy is appended as Exhibit A. My home address is 623 South Carolina Avenue, S.E., Washington, D.C. 20003.

2. Throughout the period of my employment with the federal government I have independently written on the history of Soviet-American relations, ever careful to abide by the guidelines on honorariums stated in Paragraph 13, Section A of Air Force Regulation 30-30 (26 May 1989), a copy of which is appended as Exhibit B. I have published in scholarly journals, contributed to collections of essays, reviewed books, and written the guide to a microfilm edition of State Department documents relating to World War II. For some of these activities I have received payment. I wish to continue to do so.

3. The financial rewards for historical scholarship are slight. Most historical journals pay nothing for articles, and the sums received for contributions to encyclopedias or collections of essays are customarily low. Historians employed by the federal government have nonetheless had the expectation that they, like their academic colleagues, would occasionally be compensated for their labors outside the office. The psychological gratification that some scholars receive from even token remuneration is doubtless great. But these occasional payments have also

had practical significance. Virtually all scholars, within government and without, deduct their research expenses from their income taxes. One means of doing so commonly employed by scholars who do not hold academic positions is to treat their independent scholarship as a business, and to do so it is necessary to show a nominal net "profit" two years in five. This is an important consideration because a scholar's expenses are often considerable. The costs of only two weeks working in a major repository of manuscripts, for example, can easily reach two thousand dollars when all costs—travel, room, board and photoduplication—are considerable. It is therefore necessary to receive even modest amounts of income from these activities in order to deduct these expenses.

4. I now understand that under the current law I am allowed to recover "actual and necessary travel expenses" plus expenses in the nature of "typing, editing and reproduction costs." This allowance, however, still does not permit me to recover all the expenses I bear in pursuing my research and writing activities. To illustrate the point, a number of years ago I visited the Princeton University Library in Princeton, New Jersey. I was interested in researching the papers of Louis Fischer, a prominent journalist of the 1930's. My total expenses for this brief trip of five working days were 469.00 dollars. I have not, unfortunately, been able to utilize in any published work the information that I obtained at the Princeton Library. Under the current law I should not be able to recover this as an "actual and necessary" expense. Yet, to an historian, this is a research expense like any other. In effect, the current law allows me to recover my production-related expenses only if I can tie them to a final published work. This restriction adversely affects me, as I depend on *any* income I am able to receive from my research and writing activities in order to offset my overall research expenses.

5. The managers of federal historical programs have always encouraged scholarship outside the office in the interest of promoting the professional development of their employees. Government historians, not unlike their colleagues in the academic community, tend to be judged in some measure by the quantity and quality of the sum total of their publications. The prohibition on receipt of honoraria will discourage scholarship outside the workplace, which will tend to confer an advantage upon those able to bear the costs of non-deductible expenses and will tend to retard the development of professional skills among government historians. For history, unlike mathematics or theoretical physics, is not a discipline in which progress depends greatly upon flashes of brilliance and intuition. It is through the patient accumulation of knowledge and experience that the historian hones his skills. The more a historian reads, the more he writes, the better his scholarship will be. Studies have shown that historians tend to do their best work around the age of sixty-five—later than almost any other learned discipline.

6. No one has alleged that members of the tenured federal work force are being corrupted with offers of fees for writing and speaking. My outside activities have always conformed to the requirements of the regulations, which I believe are designed to strike the proper balance between giving proper freedom to government employees and avoiding conflicts of interest and other undesirable effects.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 15th, 1991

/s/ Eduard Mark

EDUARD MARK

Mark Declaration, Exhibit B

DEPARTMENT OF THE AIR FORCE
 Headquarters US Air Force
 Washington, DC 20330-5000

AF REGULATION 30-30

26 May 1989

Personnel**STANDARDS OF CONDUCT**

This regulation applies to all Air Force personnel and activities, including the Air National Guard and US Air Force Reserve units and members. It explains Air Force personnel standards of conduct that relate to possible conflict between private interests and official duties, regardless of assignment. Close adherence to these principles will ensure compliance with the high ethical standards demanded of all public servants. Violations of the specific prohibitions and requirements of this regulation by military personnel may result in prosecution under the Uniform Code of Military Justice (UCMJ). Violations of this regulation by Air Force civilian employees may result in appropriate disciplinary action without regard to criminal liability. Administrative action, such as reprimand, may be taken with regard to military members and civilian employees who violate any requirements of this

Supersedes AFR 30-30, 21 June 1983, and AFR 30-14, 6 May 1981.

(See signature page for summary of changes.)

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regulation even if such violations do not constitute criminal misconduct.

This regulation implements Department of Defense (DOD) Directive 5500.7, 6 May 1987. It further implements Executive Order 12674, April 12, 1989, prescribing standards of ethical conduct for government officers and employees (attachment 1) and Office of Personnel Management (OPM) regulations (5 Code of Federal Regulations (CFR) Part 734 et seq.). It is in agreement with the Code of Ethics for Government Service (Public Law (P.L.) 96-303) that applies to all government personnel (attachment 2). It includes standards of conduct based on the revisions of the conflict of interest laws enacted in 1962 (P.L. 87-849), as amended, and by the Ethics in Government Act of 1978 (P.L. 95-521), as amended; it incorporates reporting requirements imposed by 10 United States Code (U.S.C.) 2397a. on certain employees and active duty officers who contact, or are contacted by, certain DOD contractors regarding future employment with that defense contractor; and includes employment restrictions on three categories of former DOD officers or employees from accepting compensation from a defense contractor during a 2-year period after their separation as required by 10 U.S.C. 2397b. It incorporates the procedures for completing DD Form 1787, Report of DOD and Defense Related Employment, as required by 10 U.S.C. 2397 and the procurement integrity provisions of 41 U.S.C. 423.

This regulation is affected by the Privacy Act of 1974. Each form required by this regulation includes a Privacy Act Statement in the body of the document or in a separate attachment to the form.

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AFR 30-30 26 May 1989

Section A—General Information

1. Terms Explained:

a. **Air Force Personnel.** Use in this regulation, unless the context indicates otherwise, means all civilian employees, including special government employees, in the Department of the Air Force (including nonappropriated fund activities), all regular and reserve officers and enlisted members of the Air Force on active duty, and officers and enlisted members of the Air Force Reserve on inactive duty for training. The definition includes professors and cadets of the US Air Force Academy.

b. **Competing Contractor.** This term, with respect to any procurement (including procurements using procedures other than competitive procedures) of property or services, means any entity that is, or is reasonably likely to become, a competitor for, or recipient of a contract or subcontract under such procurement, and includes any other person acting on behalf of such an entity.

c. **Defense Contractor.** Any individual, firm, corporation, partnership, association, or other legal entity that enters into a contract directly with DOD to furnish services, supplies, or both, including construction, to the DOD. Subcontractors are excluded, as are subsidiaries unless they are separate legal entities that contract directly with DOD in their own names. Foreign governments or representatives of foreign governments that are engaged in selling to DOD are defense contractors when acting in that context.

d. Department of Defense (DOD) Personnel. All civilian officers and employees, including special government employees, of all the offices, agencies, and DOD departments (including nonappropriated fund activities); all regular and reserve component officers (commissioned and warrant) and enlisted members of the Army, Navy, Air Force, and Marine Corps on active duty; and reserve component officers (commissioned and warrant) and enlisted members on inactive duty for training. This definition includes professors and cadets of the military service academies.

e. Former Military Officer. Reserve officers not on active duty are included in the meaning of this phrase.

f. Gratuity. Any gift, favor, entertainment, hospitality, transportation, or loan; any other tangible item; and any intangible benefits (e.g., discounts, passes, and promotional vendor training) given or extended to, or on behalf of, Air Force personnel, their immediate families, or households for which fair market value is not paid by the recipient or the US Government.

g. Honorarium (and All Variations). A payment of money or anything of value received by an officer or employee of the federal government if it is accepted as consideration for an appearance, speech, or article. The term does not include payment for or provision of actual travel and subsistence, including transportation, accommodations, and meals of an officer or employee and spouse or aide, and does not include amounts paid or incurred for any agent's fees or commissions.

h. Inside Information. Information generally not available to the public and obtained by reason of one's official Air Force or DOD duties or position.

i. Personal Commercial Solicitation. Any effort to contact an individual to conduct or transact matters involving business, finance, or commerce. This does not include off-duty employment of personnel as employees in retail stores or other situations that do not include solicited sales.

j. Procurement Official. Any civilian or military official or employee of an agency who has participated personally and substantially in the conduct of the agency procurement concerned, including all officials and employees who are responsible for reviewing or approving the procurement (and as further defined by applicable implementing regulations).

k. Reserve Officers. Includes commissioned officers of the Air National Guard and Air Force Reserve.

NOTE: As of the date of this regulation, offices responsible for implementing the Office of Federal Procurement Policy Act amendments of 1988, P.L.100-679, have not further defined the terms in b and j above.

2. Applicability and Waiver of This Regulation. This regulation applies to all Air Force personnel and activities. All Air Force personnel will become familiar with and comply with this regulation (including attachments 1 through 9). Except as specifically provided in this regulation, waivers of and exceptions to the requirements of this

regulation may be authorized or approved only by the Secretary of the Air Force (SAF). Requirements of this regulation that are based on higher authority may not be waived.

3. Ethical Standards of Conduct:

a. **General Principles.** Government service or employment is a public trust requiring Air Force personnel to place loyalty to country, ethical principles, and the law above private gain and other interests. Air Force personnel shall not take or recommend any action, including authorizing or recommending any expenditure of funds, known or believed to be in violation of US laws, Executive Orders, or applicable directives, instructions, or regulations. If the legality or propriety of any contemplated action is in question, Air Force personnel will consult with the appropriate Air Force Ethics Official or Standards of Conduct Counselor (see paragraphs 29 through 31).

b. **Affiliations and Financial Interests.** Air Force personnel must not take part in any personal, business, or professional activity or receive or retain any direct or indirect financial interest that places them in a position of conflict between their private interests and the public interests of the United States and that relates to their responsibilities as Air Force Personnel or to the duties or responsibilities of their Air Force jobs. For purposes of this prohibition, the private interests of a spouse, a minor child, and any other household members are treated as private financial interests of Air Force personnel. Air Force personnel may, however, have financial interests or engage in financial transactions to the same extent as private citizens not employed by the government as long as they are not prohibited by law or this regulation. Also see paragraph 18d.

c. **Code of Ethics for Government Service.** All Air Force employees should adhere to the Code of Ethics for Government Service (attachment 2). Copies of the Code of Ethics for Government Service will be displayed in appropriate areas of federal buildings in which at least 30 persons are regularly employed as civilian employees.

d. **Compliance With Laws.** Air Force personnel must not engage in criminal, illegal, or dishonest conduct or other conduct prejudicial to the government. Soliciting, accepting, or agreeing to accept anything of value in return for influencing, performing, or refraining from performing an official act or lawful duty is a crime (18 U.S.C. 201). Other federal laws applicable to Air Force personnel are contained in attachment 3.

e. **Other Proscribed Actions.** Air Force personnel must avoid any action, whether or not specifically prohibited by this regulation, that might result in, or create the appearance of:

- (1) Using public offices for private gain.
- (2) Giving preferential treatment to any person.
- (3) Impeding government efficiency or economy.
- (4) Losing complete independence or impartiality.
- (5) Making a government decision outside official channels.
- (6) Adversely affecting the confidence of the public in the integrity of the government.

f. **Dealing With Present and Former Military and Civilian Personnel.** Air Force personnel must not know-

ingly deal with present or former military or civilian personnel of the government if such action is prohibited by law or this regulation. (See paragraph 18.)

g. **Equal Opportunity.** Air Force personnel must scrupulously adhere to the Air Force civilian and military programs of equal opportunity. See AFRs 30-2 and 40-1613.

4. **Using Inside Information.** Air Force personnel must not engage in any personal, business, or professional activity, nor enter into any financial transaction that involves the direct or indirect use of inside information for personal advantage to themselves or others. This prohibition against use of inside information obtained while at the Department of the Air Force continues even after the individual terminates government service or employment.

5. **Gratuities:**

a. **Policy Basis.** Air Force personnel or their families who accept gratuities, no matter how innocently tendered and received, from those who have or seek business with DOD and from those whose business interests are affected by DOD or Air Force functions may:

- (1) Be a source of embarrassment to DOD.
- (2) Affect the objective judgment of the DOD personnel involved.
- (3) Impair public confidence in the integrity of the government.

b. **General Prohibition.** Except as provided in attachment 4, Air Force personnel and their immediate families must not solicit, accept, or agree to accept any gratuity for themselves, members of their families, or others (either directly or indirectly) from, or on behalf of, any defense contractor or any source that:

(1) Is engaged in or seeks business or financial relations of any sort with any DOD component.

(2) Conducts operations or activities that are either regulated by a DOD component or significantly affected by DOD decisions.

(3) Has interests that may be substantially affected by the performance or nonperformance of the official duties of DOD personnel.

(4) Is a foreign government or representative of a foreign government that is engaged in selling to DOD, when the gratuity is tendered in the context of the foreign government's commercial activities. See AFR 11-27.

c. **Limited Exceptions.** Limited exceptions to the general prohibition on accepting gratuities and additional guidance or gratuities are in attachment 4.

d. **Foreign Gifts.** Procedures concerning gifts from foreign governments are in AFRs 11-27 and 900-48.

e. **Air Force Reserve Officer Training Corps (AFROTC) Members.** Procedures concerning AFROTC staff members are in AFR 45-5.

f. **Acceptance of Gratuities in Connection With Official Travel.** Procedures for accepting transportation, accommodations, meals, or services furnished in connection with official travel are set forth in attachment 4.

g. **Prohibited Acceptance of Gratuities by Procurement Officials.** During the conduct of any federal agency procurement of property or services, no procurement official of such agency shall knowingly ask for, seek, accept, or agree to receive any money, gratuity, or thing of value from any officer, employee, representative, or consultant of any competing contractor for such procurement. Procurement officials are defined in paragraph 1j. Violators

are subject to civil fine not in excess of \$100,000 (P.L. 100-679, Sec 6). Attachment 4 exceptions apply.

6. **Contributions or Gifts to Superiors.** Air Force personnel must not solicit a contribution from other DOD personnel for a gift to an official superior, make a donation or a gift to an official superior, or accept a gift or donation from other subordinate DOD personnel. This prohibition also applies to gifts or contributions to immediate family members of an official superior. However, this paragraph does not prohibit voluntary gifts of reasonable value or voluntary contributions of nominal amounts (or acceptance thereof) on special occasions such as marriage, illness, transfer, or retirement, provided any gifts acquired with such contributions do not exceed a reasonable value under the circumstances.

7. **Using Government Facilities, Property, and Manpower.** Air Force personnel have a positive duty to protect and conserve government property and facilities. Air Force personnel must not directly or indirectly use, or allow the use of, government property or facilities, including property or facilities leased to the government, for other than officially approved activities. Government facilities, property, and manpower must be used only for official government business. Government facilities, property, and manpower include (but are not limited to), equipment, supplies, duplication machines, computer facilities, stenographic and typing assistance, and chauffeur services. This paragraph is not intended to prevent using government facilities, property, or manpower for approved activities that would further military-community relations, provided such use does not interfere with military missions.

8. **Using Official Air Force Position.** Air Force personnel must not use their Air Force positions to induce,

coerce, or influence a person (including subordinates) in any way to provide any personal benefits, financial or otherwise, to themselves or others.

9. **Using Civilian and Military Titles in Connection With Commercial Enterprises or Fund-Raising Activities:**

a. Full-time Air Force civilian employees or active duty military personnel are not allowed to use their grade, official title, or positions in connection with any commercial enterprise or for endorsing a product. Such personnel may make speeches or publish books or articles that identify them by reference to their title or position, provided that the subject material of such speech or publication is approved for public release according to paragraph 12c and has been cleared under existing Air Force procedures. See AFR 190-1.

b. All retired military personnel and all members of reserve components, not on active duty, are permitted to use their military titles in connection with commercial enterprises if they indicate their reserve or retired status. Such use of military titles must in no way cast discredit on the Air Force or DOD. Such use is also prohibited in connection with commercial enterprises if such use (with or without the intent to mislead) gives rise to any appearance of sponsorship, sanction, indorsement, or Air Force or DOD approval. The Air Force may restrict retired personnel and members of reserve components not on active duty from using their military titles in connection with public appearances in overseas areas.

c. The high visibility of Air Force officials generate requests from charitable and non-profit organizations to use an official's name and title in conjunction with fund-raising activities. The use of names and titles of Air Force officials, even regarding fund-raising activities of charitable organizations, may give an improper impres-

sion that the Department of the Air Force endorses the activities of a particular organization, thereby resulting in unauthorized assistance for the organization or sponsors of the activities. The presence of Air Force officials may be sought, under the guise of bestowing awards upon the official, to promote attendance at programs. Air Force officials shall not allow the use of their names or titles in connection with charitable or nonprofit organizations, subject to the following:

(1) The Department of the Air Force may assist only those charitable programs administered by the OPM under its delegation from the President and those other programs authorized by other Air Force regulations.

(2) This prohibition does not preclude Air Force officials from giving speeches before such organizations if the speech is designed to express an official position in a public forum.

(3) This prohibition does not preclude volunteer efforts on behalf of charitable or non-profit organizations by individuals who do not use their official titles in relation to solicitations and who do not solicit from individuals or entities with whom they do business in their official capacity.

(4) Air Force officials may endorse the United Service Organizations (USO) publicly and factually for the beneficial work they do in supporting the military community and may attend USO fund-raising events in an official capacity.

10. Commercial Soliciting by Air Force Personnel. To eliminate the appearance of coercion, intimidation, or pressure from rank, grade or position. Air Force personnel are prohibited from making personal commercial solicitations or solicited sales to DOD personnel who are

junior in rank or grade, or their family members, at any time, on or off-duty. (See paragraph 1i):

a. This limitation includes, but is not limited to, soliciting and selling insurance, stocks, mutual funds, real estate, and any other commodities, goods, or services.

b. This prohibition does not apply to the one-time sale or lease by an individual of personal property or a privately owned dwelling.

c. For civilian personnel, the limitation applies only to personnel under their supervision at any level.

11. Membership in Associations. All Air Force personnel who are members or officers of nongovernmental associations or organizations must avoid activities for such associations or organizations that are not compatible with their official government positions. Further, Air Force personnel must not accept an honorary office or an honorary membership in any trade or professional association whose membership includes business entities that are engaged or are endeavoring to engage in providing goods or services to a DOD component (including any nonappropriated fund activity of DOD). An honorary office includes any position, whether termed honorary or not, selected on the basis of an official DOD function, or assignment. (See AFR 30-9.)

12. Outside Employment of Air Force Personnel:

a. Air Force personnel must not engage in outside employment or other outside activity, with or without compensation, that:

(1) Interferes with or is not compatible with performing their government duties.

(2) May reasonably be expected to bring discredit on the government or DOD.

(3) Is otherwise inconsistent with the requirements of this regulation, including the requirement to avoid actions and situations that reasonably may appear to create conflicts of interests.

b. Air Force enlisted members on active duty may not be ordered or permitted to leave their post to engage in a civilian pursuit or business or perform in civil life (for emolument, hire, or otherwise) if the pursuit, business, or performance interferes with the customary or regular employment of local civilians in their art, trade, or profession (10 U.S.C. 974).

c. Air Force personnel are encouraged to engage in teaching, lecturing, and writing. See paragraph 13, if applicable:

(1) Air Force personnel must not engage in teaching, writing, or lecturing (whether for compensation or not) that is dependent on information obtained as a result of their government service or employment. Such information may be used if it has been published or is available to the general public or will be made available on request or when the SAF gives written authorization for the use of nonpublic information on the basis that the use is in the public interest.

(2) Civilian Presidential appointees must not receive pay or anything of monetary value for any consultation, lecture, discussion, writing, or appearance, if the subject matter is devoted substantially to the responsibilities, programs, or operations of the Air Force, or draws substantially on official data or ideas that have not become public information.

d. A military member may engage in off-duty employment with an organization involved in a strike if the member was on the payroll of such organization before

the strike started and if the employment conforms with the requirements of this regulation. After a strike begins and while it continues, a military member may not accept employment by an involved organization at the strike location. Members who are engaged in off-duty civilian employment that does not conform to the above policy are required to end such employment.

e. This paragraph does not prevent Air Force personnel from:

(1) Participating in activities of national or state political parties not prohibited by law or regulation. See AFR 110-2.

(2) Participating in affairs of or accepting an award for a meritorious public contribution or achievement given by a charitable, religious, professional, social, fraternal, nonprofit educational, nonprofit recreational, public service, or civic organization.

f. Each commander of a major command (MAJCOM) and each head of a separate operating agency (SOA) will make sure that local implementing regulations require at least that Air Force personnel obtain local commander approval for any off-duty employment with a firm or other entity that is engaged in or is endeavoring to engage in business transactions of any kind with a DOD agency. Local commanders must set internal administrative procedures to evaluate each request submitted and notify the applicant whether the proposed off-duty employment agrees with the requirements of this regulation.

13. Honoraria. Air Force personnel shall not accept honoraria or other salary supplementation for performance of official duties (see 18 U.S.C. 209) or for taking part in activities that are connected with service as an officer or employee of the government, or otherwise

tendered in the officer's or employee's official government capacity. Honoraria tendered under such circumstances become the property of the United States and must be deposited to the Treasury. Any honorarium or fee tendered by a state governmental agency for the appearance of an Air Force expert witness may be accepted only on behalf of the United States and endorsed to the Treasury of the United States as reimbursement for the expert's governmental pay while in temporary duty status as a witness. Air Force personnel shall not suggest charitable contributions in place of such honoraria. When acting in a personal rather than official capacity, honoraria may be accepted subject to the following conditions:

- a. Before accepting any honorarium, Air Force personnel shall consult with the appropriate ethics official or standards of conduct counselor.
- b. The appearance, speech, or article must be given and prepared on off-duty time or in a leave status.
- c. An honorarium may not exceed \$2,000 (excluding expenses for travel and subsistence, including for spouse or aide, and agents' fees or commissions) per appearance, speech, or article (see 2 U.S.C. 441i).
- d. Air Force personnel shall not accept an honorarium from any DOD contractor if such acceptance may result in a conflict of interest or the appearance thereof. Before accepting an honorarium from a DOD contractor, written approval must be obtained from the individual's superior and the appropriate ethics official or standards or conduct counselor.

14. Relationship With Defense Contractors:

- a. Prohibited Conduct. Air Force personnel shall not use the Department's relationship with defense contractors or potential defense contractors to induce, coerce, or seek

any favors, gratuities, or actions other than those authorized by contract or by law.

- b. Commitments or Promises. Air Force personnel, other than contracting officers acting in their official capacity, shall not make any commitment or promise relating to award of a contract nor make any representation that reasonably may be construed as such a commitment.

- c. Release of Information. Air Force personnel must not release any information concerning proposed acquisitions or purchases by any Air Force contracting activity, except according to authorized procedures.

15. Assigning Reservists for Training. Air Force personnel who are responsible for assigning reservists for training must not assign them to duties in which they will obtain information that could be used by them or their private sector employers to the disadvantage of civilian competitors. Reservists must disclose to their superiors and assignment personnel information necessary to make sure that no conflict exists between their duty assignments and private employment. Reservists on promotion boards shall not participate in promotion decisions that may directly or predictably affect their private financial interests.

16. Gambling, Betting, and Lotteries. Air Force personnel must not take part in any unauthorized gambling activity while on government owned, controlled, or leased property, or while on duty for the government. This includes operating a gambling device; conducting a lottery, pool, or game for money or property; or selling or purchasing a numbers slip or ticket. However, this paragraph does not prevent:

- a. Activities necessitated by an employee's law enforcement duties.

b. Fund-raising activities under Section 3 of Executive Order 10927 and similar Air Force approved activities, including those found in AFRs 176-1, 215-1, 215-11, and 215-21, or as otherwise authorized.

c. Authorized sale and purchase of state lottery chances at vending facilities operated by blind licensees according to the Randolph-Sheppard Vending Stand Act (20 U.S.C. 107-107f) and implementing regulations (34 CFR 395.35(c)(3)).

d. Other activities that have been specifically approved by SAF.

17. Indebtedness. Air Force personnel must pay in a proper and timely manner their just financial obligations, especially those imposed by law, such as federal, state, and local taxes. For purposes of this paragraph, "just financial obligation" means one acknowledged by the individual or reduced to judgment by a court, and "in a proper and timely manner" means in a manner that under the circumstances does not reflect adversely on the government as the debtor's employer. This paragraph does not require the Air Force to determine the validity or amount of disputed debts.

Section B—Implementation of Conflict of Interest Laws

18. Full-Time Air Force Officers and Employees:

a. Definition. The term "full-time officer or employee" includes all civilian officers and employees and all military officers on active duty, except those who are "special government employees" (see paragraph 19); it does not include enlisted personnel. Enlisted personnel are included in the term "Air Force personnel" (see paragraph 1a).

b. Prohibited Compensation. Full-time officers and employees are prohibited from directly or indirectly receiving or seeking compensation for services rendered or to be rendered before any department or agency in connection with any contract, claim, controversy, or particular matter in which the United States is a party or has a direct and substantial interest. The purpose of this section is to reach any situation, including those where there is no intent to be corrupted or to provide preferential treatment, in which the judgment or efficiency of a government agency might be influenced because of payments or gifts, made by reason of the position occupied, to that official in a manner otherwise than provided by law. (18 U.S.C. 203).

c. Prohibited Representation. Full-time officers and employees may not, except in discharging their official duties, represent anyone else before a court or government agency in a particular matter in which the United States is a party or has a substantial interest. This prohibition applies both to paid and unpaid representation of another (18 U.S.C. 205).

d. Prohibited Salary Supplementation. Full-time officers and employees may not receive any salary or supplementation of their government * * *.

EXHIBIT 16

DECLARATION OF ARNOLD A. PUTNAM

1. I am an Electronics Engineering Technician employed by the United States Government at the Portsmouth Naval Shipyard in Kittery, Maine. I work on shipboard radio, radar, sonar, navigation, fire control equipment and internal communications equipment for the External Engineering Support Area, Code 280.25.41. Specifically, I prepare and develop engineering drawings for electronic equipment aboard nuclear submarines. I have been employed by the government for 18 years. My current government grade level is GS-11. My home address is Rural Route 2, Box 1354, Wildes District Road, Kennebunkport, Maine, 04046.

2. On my own time and without using government resources, I write articles for publication in the areas of philosophy, American history, and the history of science and technology. According to Portsmouth Naval Shipyard Instructions, "(s)hipyard personnel are encouraged to engage in teaching, lecturing, and writing." Portsmouth Naval Shipyard Instruction 5370.2F. Shipyard personnel may not, however, engage in activities dependent on information obtained as a result of government employment, unless that information has already been made available to the public. *Id.* The articles I write for publication do not rely on information I have obtained as a result of my government employment.

3. In August 1990, an article I wrote was accepted for publication in *Yankee Magazine* (Dublin, New Hampshire) entitled "Portsmouth's Civil War Monitor." A monitor is a type of ship, powered by steam, with one or more revolving turrets. My article discusses the "USS AGAMENTICUS," a monitor constructed during the Civil War. I was paid \$150 for first magazine rights. *Yankee Magazine* intends to publish the article in its "Historical Footnote" section this year.

4. Until the law banning honoraria went into effect, I had been pursuing research for two articles that I had planned to publish, if accepted. One article involves Light Draft Civil War Monitors, which I had intended to submit to *United States Naval Institute Proceedings*, a private publication. The other involves the mechanical operations of monitor turrets, which I had intended to submit to *Scientific American*. I had planned to complete both articles and submit them for publication some time this year. Because of the new law banning honoraria, I have ceased my research until such time as the questions concerning the law have been resolved.

5. If the honoraria ban remains in effect, I will probably cease my research altogether. The research for my articles requires that I expend significant funds up front, before my articles are accepted for publication. For example, I have been required to travel to Washington, D.C., Boston, and New York in order to review sources not otherwise available to me. I bear the expenses incurred for this travel on my own. I do not take any tax deductions for such expenses because the IRS regards my outside writing as a "hobby." Without the prospect of receiving any compensation for my published articles, I have been forced to discontinue my research. I cannot afford to continue my research and writing if I am not allowed to realize any return whatsoever on my investment of time and money.

6. Eventually, I would like to publish a book on the development, construction, and operation of monitors used in the Civil War. I envision that this book would be a definitive study on the different shipbuilding techniques used by the Confederate and Union forces during the Civil War. However, if my manuscript is to stand a real chance of publication, I must first establish a "track record" by publishing articles in this field. Since the new law banning honoraria will affect whether I continue to research,

write, and submit articles, it will also affect my ability ultimately to publish this book.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 6, 1991.

/s/ Arnold A. Putnam
ARNOLD A. PUTNAM

EXHIBIT 17

AFFIDAVIT OF JOHN C. SHELTON

1. I am employed by the Internal Revenue Service as a GS-7 tax examiner in the St. Louis District. I have been employed by the IRS for four years and have been a full-time employee since October 1988. I am a member of the National Treasury Employees Union and a steward at NTEU Chapter 14 in St. Louis.

2. In my non-work time, I write sports stories and box scores as a stringer for the Associated Press. I cover St. Louis Cardinals baseball games and St. Louis Blues hockey games. AP gives me a schedule of events to cover some weeks before they take place. If I cannot cover these games, AP assigns them to other stringers, who are eager to obtain the extra income.

3. In covering these games, I estimate that I incur \$600 to \$700 in annual expenses for local travel, which AP does not reimburse. On average, I earn \$100 each month from October through April covering hockey games, and \$300 to \$500 a month from April through October covering baseball games. Over the last several years, my income from sportswriting as an AP stringer has averaged approximately \$1500 to \$2000 annually.

4. I am currently scheduled to cover a hockey game between the St. Louis Blues and the New York Rangers on January 5, 1991, and expect to receive additional assignments in the near future to cover other hockey games in January and February 1991. However, I have learned that federal law will prevent me from receiving compensation for these assignments, and unless a preliminary injunction goes into effect, I will be forced to turn them down.

5. Over the past several years, I have also earned extra income writing for a local hospital newsletter. While I do not currently have a contract to write for the newsletter, it is very likely that I will be asked to do so again in 1991. In 1989, the last year for which I have complete records of my income from this activity, I earned approximately \$2400.

6. I have received permission from the IRS to engage in my outside writing activities because there is no possibility of conflict with my duties for the IRS.

7. I have recently learned that Congress has prohibited federal employees from receiving "honoraria" for speeches, articles, and appearances, effective January 1, 1991. I believe that this prohibition will cover the money that I receive for my articles.

8. Recently I bought a house under a Missouri First-Time Buyer Program mortgage financed by the Federal Housing Administration. I was told by the financial officer administering the mortgage that I would not have qualified for the mortgage if I had not been receiving the outside income from my part-time writing activities. In fact, based on my current financial situation, I will not be able to continue making payments on my mortgage if I have to give up the income from my writing. Thus, I have been placed in the predicament of choosing between my job as a tax examiner and my outside writing activities, neither of which, standing alone, can provide adequate financial support.

9. If I were compelled to end my writing career, I would lose the intellectual pleasure, as well as the additional income, that I receive from those activities.

10. If NTEU or some other plaintiff is successful in obtaining a preliminary injunction prohibiting the government from enforcing this prohibition on honoraria, I plan to continue writing. In the immediate future, for example, I would be able to cover hockey games in January, as planned.

I declare under penalty of perjury that this statement is true and correct to the best of my information and belief.

Date: 12/15/90

/s/ John C. Shelton

JOHN C. SHELTON

EXHIBIT 18

AFFIDAVIT OF LYNDIA VASTINE

1. I am employed by the Department of Health and Human Services Health Care Financing Administration, Medicare Division in Chicago, Illinois, as a Program Specialist and Freedom of Information Coordinator. I have held my current position since December 1989, and have been an HHS employee since April 1980. I am a member of the National Treasury Employees Union.

2. In my non-work time, I am a race course official at the Indianapolis Motor Speedway and at various other race tracks in a four state area. It is my intention to pursue a career as a free-lance writer of children's articles. I am an epileptic woman, and publishers of auto racing periodicals have approached me about writing articles for children about disabled people and women in auto racing. In preparation for this activity, I have enrolled in and completed a substantial part of an accredited extension course on writing for children, offered at a tuition of more than \$1000 by the Institute for Children's Literature. The tuition is paid in full and nonrefundable. As part of the course, I am required to submit a children's article for publication - a requirement that, because some periodicals insist on paying for articles selected for publication, I may find difficult to meet because of the ban on writing for compensation.

3. For some time, I have also engaged in paid singing at weddings and in other public forums, in addition to unpaid performances as a member and soloist in my church choir.

4. I was recently told by my agency ethics officer that, as a result of the honoraria ban in the Ethics Reform Act, I must discontinue my paid writing and singing appearances. My agency ethics officer stated that I would be suspended if I continued these activities. According to this officer, the law provides no exception for written work or singing appearances. Therefore, I have discontinued my First Amendment activities for the duration of NTEU's law suit challenging the honoraria ban of the Ethics Reform Act. I will resume these expressive activities only if the ban on compensated writing and appearances is struck down. I have also turned down an award offered for my singing.

5. I believe that I am entitled to compensation for the time and effort I spend researching and writing articles for publication, and practicing and performing music. I estimate that the ban on paid writing and public appearances will cost me approximately \$6000 annually in lost earnings. Moreover, the expenses associated with these activities do not only include such day-to-day expenses as travel, typewriter paper, and the like, but also involve considerable capital investments that are not compensable under the Ethics Reform Act. In addition to my course fees, I have invested approximately \$8000 in word processing equipment. The Ethics Reform Act would force me to absorb these capital costs permanently, and to forgo the tax benefits of capital depreciation, as the price of continuing my uncompensated expressive activities.

6. While the inability to defray my capital investment in my part-time writing and singing is a crucial imposition resulting from the Ethics Reform Act, my incentive to continue investing time in this work is also substantially

reduced by the ban on compensated expression. The time I spend preparing articles and practicing and performing music could readily be invested in a profitable activity, such as working overtime at HHS. Because I would be entitled to accept payment for these activities if the government had not determined to regulate this field, and because the law imposes economic disadvantages on me for choosing speech over some other activity, I believe the ban constitutes an affirmative penalty on my choice to engage in First Amendment activities, and I find this singling out of my expressive activities for such a penalty extremely offensive.

I affirm on penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Date: 3/29/91

/s/ Lynda S. Vastine

LYNDA VASTINE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 90-2922 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION,
and
JAN ADAMS GRANT,
and
THOMAS C. FISHELL,
and
ALL OTHER SIMILARLY SITUATED
UNNAMED INDIVIDUALS,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA,
and
RICHARD THORNBURGH,
IN HIS CAPACITY AS
ATTORNEY GENERAL,
and
STEPHEN D. POTTS,
IN HIS CAPACITY AS
DIRECTOR, OFFICE OF GOVERNMENT ETHICS,
and
OFFICE OF GOVERNMENT ETHICS,
DEFENDANTS.

EXHIBIT 19
STIPULATION

The parties to the above-captioned action stipulate as follows:

1. Stephen D. Potts is the Director of the U.S. Office of Government Ethics.

2. In an article in the *Washington Post* (p. A25; December 14, 1990; article written by Michael Isikoff), Mr. Potts is quoted as saying that the ban on federal employees accepting honoraria is

"not necessary to protect the integrity of the government" and,

"It's the kind of thing where you get a person who was an expert on wine and wrote occasional articles on wine or somebody who raises sheepdogs and gives talks to kennel clubs."

3. The quotations that appeared in the December 14, 1990 article in the *Washington Post* are accurate and reflect the opinion of Mr. Potts.

4. The December 14, 1990 article in the *Washington Post* is accurate in stating that the Office of Government Ethics is working with congressional sponsors to amend the Act to remove the ban on federal employees accepting honoraria for speeches, articles, and appearances for matters not related to their government work.

5. In an article in the *New York Times* (p. A24, December 4, 1990; article written by Robert Pear), Mr. Potts is quoted as saying in a December 4th interview that the law, as it now stands in its application to civil servants for speeches, articles, and appearances unrelated to their government work, is "too restrictive."

6. The quotation that appeared in the December 4, 1990 article in the *New York Times* is accurate and reflects the opinion of Mr. Potts.

7. In an article in the *San Diego Union* (p. A25, December 6, 1990; Knight-Ridder News Service), Mr. Potts is quoted as saying, in discussing the application of the Ethics in Government Act's honoraria ban to civil servants, that

the Act was "drafted overbroadly;" and,

the Act's inclusion of civil servants in its honoraria ban "was just a mistake and we'll be pushing for corrective legislation in the new term [of Congress]."

8. The quotation that appeared in the December 6, 1990 article in the *San Diego Union* are accurate and reflect the opinion of Mr. Potts.

9. The December 6, 1990 article in the *San Diego Union* is accurate in stating that Mr. Potts knows of nothing harmful or unethical when government workers speak or write about subjects unconnected to their jobs.

For Plaintiffs:

/s/ Gregory O'Duden

/s/ Elaine Kaplan

/s/ [Signature Illegible]

Dec. 18, 1990

Date

For Defendants:

/s/ Jeffery S. Gutman

12/18/90

Date

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 90-2922 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

JOINT STIPULATION AND ORDER

The parties hereby stipulate that this case shall be certified as a class action, in accordance with Fed. R. Civ. P. 23(b)(2), brought on behalf of every "employee," as defined by the interim rule issued at 56 Fed. Reg. 1723 (January 17, 1991), to be codified at 5 C.F.R. 2636.102(c) & (d), below grade GS-16, who—but for 5 U.S.C. app.

501(b)—would receive "honoraria", as defined in 5 U.S.C. app. 505(3).

Respectfully submitted,

/s/ Jeffrey S. Gutman

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Attorneys for
Plaintiffs

SO ORDERED:

4/25/91

Date

/s/ [SIGNATURE ILLEGIBLE]

U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Nos. 90-2922, 90-3044 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

PETER G. CRANE, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

PLAINTIFFS' JOINT STATEMENT OF MATERIAL FACTS
NOT IN DISPUTE

PARTIES

1. Plaintiff National Treasury Employees Union ("NTEU") is a federal-sector labor union that represents over 140,000 federal employees nationwide. Certain of NTEU's members, as well as non-member employees within NTEU's bargaining units, receive income from articles, speeches, or appearances. NTEU Second Amended Complaint, para. 3.

2. Plaintiff NTEU Chapter 143 ("Chapter 143") is a local union chapter representing employees of the

Customs Service in El Paso, Texas. NTEU Second Amended Complaint, para. 4; Giunta aff. para. 1.

3. The individual named plaintiffs and affiants are employees of the executive branch of the federal government. NTEU Second Amended Complaint, para. 5, 6; Crane Amended Complaint, para. 4-12; attached affidavits and declarations.

4. Prior to January 1, 1991, individual plaintiffs and affiants accepted compensation for a variety of articles, speeches, and appearances within the definition of Section 505 of the Ethics Reform Act (see below, para. 9) and Section 2636.203 of the regulations promulgated by the Office of Government Ethics (see below, para. 12). NTEU Second Amended Complaint, para. 5, 6; Crane Amended Complaint, para. 4-12; attached affidavits and declarations.

5. Individual plaintiffs and affiants engaged in their writing, speaking, and public appearances on their non-work time. Their writing, speaking, and public appearances were unrelated to their official duties for the government. Applying conflict of interest regulations in effect prior to January 1, 1991, the employing agencies of at least some of the plaintiffs and affiants had concluded that their writing, speaking, and public appearances did not result in a conflict of interest or the appearance of a conflict of interest with their official duties and responsibilities. Grant aff. para. 9; Fishell aff. para. 8; Mark dec. para. 2, 5; Putnam dec. para. 2; Hanna dec. para. 4.

6. The defendants are the United States of America, Attorney General Richard Thornburgh, the Office of Government Ethics ("OGE"), and OGE Director Stephen D. Potts. NTEU Second Amended Complaint, para. 8, 9, 10; Crane Complaint, para. 14, 15, 16.

**THE BAN ON RECEIPT OF "HONORARIA"
IN THE ETHICS REFORM ACT OF 1989**

7. Executive branch employees have long been prohibited from receiving any compensation for speaking and writing on subjects that focus specifically on the employing agency's responsibilities, policies and programs, that create a conflict of interest or the appearance of one, or that interfere with the employee's official duties. 5 C.F.R. Ch. 1, Section 735.203.

8. Federal employees have long been permitted and, indeed, encouraged to engage in teaching, lecturing and writing that does not conflict with their official duties. 5 C.F.R. Ch. 1, Section 735.203(c). Agencies have viewed employee publication of articles as enhancing the government's reputation or promoting the professional development of their employees. Deutsch dec. para. 8; Mark dec. para. 5.

9. Title VI of the Ethics Reform Act of 1989 (Public Law 101-194, 5 U.S.C. app. 501, *et seq.*) was enacted on November 30, 1989, and took effect on January 1, 1991. Sec. 603. Sec. 501(b) states that "[a]n individual may not receive any honorarium while that individual is a Member, officer or employee." Sec. 505 defines "officer or employee" as "any officer or employee of the Government except (A) any individual (other than the Vice President) whose compensation is disbursed by the Secretary of the Senate or (B) any special Government employee (as defined in section 202 of title 18, United States Code)." Sec. 505 further defines "honorarium" as "a payment of money or any thing of value for an appearance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses. . . ."

10. Section 504 of the Ethics Reform Act provides that "[t]he Attorney General may bring a civil action in any

appropriate United States district court against any individual who violates any provision of section 501. . . . The court in which such action is brought may assess against such individual a civil penalty of not more than \$10,000 or the amount of compensation, if any, which the individual received for the prohibited conduct, whichever is greater."

11. The Office of Government Ethics ("OGE") is charged with administrative authority, under 5 U.S.C. app. 503, to issue rules and regulations under this Title with respect to officers and employees of the executive branch.

12. OGE issued initial guidance on November 28, 1991, and issued interim regulations on January 17, 1991, effective January 1, 1991. 56 Fed. Reg. 1721 (Jan. 17, 1991), to be codified in 5 CFR Part 2636. The regulations include the following definitions:

Article means a writing other than a book or a chapter of a book, which has been or is intended to be published or republished in a journal, newspaper, magazine or similar collection of writings. The term does not include works of fiction, poetry, lyrics, or script.

Speech means an address, oration, or other form of oral presentation, whether made in person, recorded, or broadcast. Unless the opportunity was extended to the employee wholly or in part because of his official position, the term does not include the recitation of scripted material, as for a live or recorded theatrical production, or any oral presentation that is an incident of any performance that is excluded from the definition of an *appearance* in paragraph (b) of this section. It does not include the conduct of worship services or religious ceremonies.

Appearance means attendance at a public or private conference, convention, meeting, hearing, event or other gathering and the incidental conversation or remarks made at that time. Unless the opportunity was extended to the employee wholly or in part because of his official position, the term does not include performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display.

56 Fed. Reg. at 1725-26. The regulations further provide that "speech" does include "a talk on theology given to other ministers, . . . offering a prayer at the opening of a convention or . . . delivering a sermon during a worship service conducted by another minister." 56 Fed. Reg. at 1726.

13. The regulations issued by OGE define "Honorarium" as "a payment of money or anything of value for an appearance, speech or article." 56 Fed. Reg. at 1725. Receipt of payment is prohibited even if the writing and speaking occur during nonwork hours, and even when they result in no real or apparent conflict with the employees' official duties.

14. Stephen D. Potts, the Director of OGE, is of the opinion that the extension of the ban to lower level federal employees is "not necessary to protect the integrity of the government," was "drafted overbroadly," is "too restrictive," and, in fact, "was just a mistake." Stipulation (Exh.).

15. OGE strongly supported the efforts during the last term of Congress to amend the Ethics Reform Act to permit career government employees to continue to receive compensation for appearances, speeches, or articles (136 Cong. Rec. S17258 (Oct. 26, 1990) (statement by Sen. Glenn excerpting letter from Potts urging corrective

legislation)). Under legislation supported by the administration, employees could receive honoraria for such activities if those activities were unrelated to their official duties and the party offering the honoraria had no interests that might be substantially affected by the performance or nonperformance of that individual's official duties (*Id.*).

IMPACT OF THE HONORARIA BAN ON PLAINTIFFS

16. Before January 1, 1991, plaintiff NTEU Chapter 143 regularly published a newsletter that it distributed to bargaining unit employees. Chapter 143 used the newsletter to communicate important work-related and union-related matters to bargaining unit employees. Chapter 143 paid a federal employee, on a non-contractual, free-lance basis, to write its newsletter. *Giunta* aff. para. 3, 4, 5.

17. The employee hired by Chapter 143 to write its newsletter is barred by the Ethics Reform Act from accepting compensation for the articles that he writes. He refuses to write the newsletter without compensation. *Giunta* aff. para. 6, 7, 8.

18. Chapter 143 has been unable to find any qualified federal employee to write the newsletter without compensation or any other qualified non-employee who is willing to write the newsletter for the compensation that Chapter 143 is able to pay. Chapter 143 is unable to publish a regular, timely, comprehensive, well-written, and well-informed newsletter without the services of a paid writer. As a result, Chapter 143 has been unable to publish its newsletter since January 1, 1991. Its ability to communicate with bargaining unit employees has been severely hampered by the loss of its newsletter. *Giunta* aff. para. 8, 9, 10.

19. Individual plaintiffs and affiants incur various expenses in the course of writing or speaking for which they cannot accept reimbursement under the statute and the regulations. These expenses include the purchase of word processing equipment and software, professional memberships, subscriptions to publications, purchase of research and professional books, purchase of audio equipment, maintenance of home offices, and other expenses of a capital nature or unrelated to a specific article, speech, or public appearance. Kennedy supp. aff. para. 4; Fishell supp. aff. para. 4; Grant supp. aff. para. 4; Vastine aff. para. 5; Deutsch dec. para. 14; Mark dec. para. 3, 4.

20. Some plaintiffs incurred loss of pay from their federal job in order to pursue their expressive activity. Plaintiff Crane took an extended leave without pay in order to pursue his research. Crane dec. para. 3. Plaintiff Feyer sometimes takes leave without pay to present his religious lectures and classes. Feyer dec. para. 4.

21. Travel or research expenses (such as photocopying) are often incurred over an extended period of time. They may not be related to a particular published article or speech or, indeed, to any article or speech. Free-lance writers and speakers often offset their expenses, not against a particular article or speech, but rather against their income from their writing and speaking activity taken as a whole over an extended period of time. Mark dec. para. 4; Deutsch dec. para. 14; Hanna dec. para. 12; Gordon dec. para. 13.

22. Some plaintiffs and affiants deduct their expenses on their tax returns as business expenses and depreciate their capital investments. Mark dec. para. 3. If their writing, speaking, or public appearances are no longer compensable activities, they will suffer adverse tax consequences. Mark dec. para. 3; Kennedy supp. aff. para. 4; Grant supp. aff. para. 4.

23. Individual plaintiffs and affiants have invested time, effort, and expense in developing the expertise and skill necessary to write articles, deliver speeches, and make public appearances. Some have advanced degrees in the fields on which they lecture or write. Fishell supp. aff. para. 4; Feyer dec. para. 3; Grant supp. aff. para. 4. Others have taken course work specifically intended to further their writing and speaking careers. Vastine aff. para. 2; Kennedy supp. aff. para. 4. The compensation that they earn from their writing, speaking, and public appearances is partial reimbursement for that investment.

24. Individual plaintiffs and affiants have devoted time to their writing, speaking, and public appearances that they could spend on other outside employment for which they would be legally entitled to accept compensation. Kennedy supp. aff. para. 6; Grant supp. aff. para. 5; Fishell supp. aff. para. 5; Vastine aff. para. 6.

25. Some plaintiffs and affiants cannot afford to continue writing or speaking, at least at current levels, without compensation. Gordon dec. para. 14, 15; Shelton aff. para. 8. Some have already, others will soon, and still others will eventually, abandon their unpaid expressive activity for other, paid part-time employment. Hanna dec. para. 11, 13; Kennedy supp. aff. para. 3. Others will choose between continuing their writing or speaking careers and continuing their government employment. Deutsch dec. para. 16; Feyer dec. para. 9.

— 26. Individual plaintiffs and affiants derive significant incentive to engage in writing, speaking, and public appearances from the compensation that they receive from such activity. The incentive is both financial and psychological. Thus, certain individuals are motivated, at least in part, from the desire or need to earn additional income from their expressive activity. In addition, the

receipt of income from an activity is a reaffirmation of the worth of that activity in the eyes of both the recipient and society as a whole. The inability to accept compensation for writing or speaking directly undermines their incentive to engage in that activity. Deutsch dec. para. 10, 12; Shelton aff. para. —; Hanna dec. para. 11; Grant supp. aff. para. 5; Gordon dec. para. 14, 15; Kennedy supp. aff. 6; Fager dec. para. 5.

27. Some individual plaintiffs and affiants have ceased or curtailed their writing, speaking, or public appearances as a result of the ban on their receipt of compensation for those activities. Putnam dec. para. 4, 5; Grant supp. aff. para. 3; Fishell supp. aff. para. 3; Deutsch dec. para. 10, 11; Hanna dec. para. 10, 13; Jackson dec. para. 6.

28. Some plaintiffs and affiants will temporarily continue to write or speak without compensation, in order to protect their credentials and with the intention of resuming compensated expression as soon as legally permitted. Jackson dec. para. 7; Kennedy supp. aff. para. 3. Some are continuing their expressive activities and are placing their compensation in escrow. Feyer dec. para. 8, 9; Gordon dec. para. 11. They will either leave the government or cease or curtail that activity if the challenged statute is not legislatively amended or declared unconstitutional. Kennedy aff. para. 3; Feyer dec. para. 9; Gordon dec. para. 15. One plaintiff has accepted compensation for an article written to protest the ban and has donated the sum received to charity. Crane dec. para. 9, 10.

29. Article writing by certain individual plaintiffs and affiants assists them in other endeavors not covered by the ban, such as the publication of books. A failure to write and publish articles can harm plaintiffs in securing publication of their books. Grant aff. para. 7; Putnam

dec. para. 6. Publication of articles can provide helpful scholarly feedback and can pique readers' interest in the subject, encouraging interest in other works by the plaintiffs. Hanna dec. para. 9.

30. Continued article writing, speaking, and public appearances are necessary to further the professional careers of certain plaintiffs and affiants, to develop and maintain relationships with editors and publishers, or to assist them in making career changes into fields related to their writing, speaking, and appearances. For example, plaintiff Hanna will suffer damage to her scholarly reputation if her outside writing, lecturing and consulting are diminished. Hanna dec. para. 15. Plaintiff Mark is a professional historian whose career also depends on continued publication of scholarly articles. Mark dec. para. 5. Affiant Kennedy depends on her writing to develop credentials for a planned career change. Kennedy aff. para. —. The ban on receipt of compensation forces them to choose between sacrificing income and sacrificing long-term professional goals.

31. Certain publishers refuse to publish articles without paying for those articles. Some professional associations, including those to which some plaintiffs belong, strongly discourage or prohibit their members from writing without compensation. Jackson dec. para. 6, 7, 8; Kennedy supp. aff. para. 2; Vastine aff. 2.

32. Some agency ethics officers have distributed incorrect or incomplete information to employees. Employee Vastine has been told that she cannot receive compensation for singing in church. Vastine aff. para. 4. Employee Gordon was told that he could accept travel expenses but was not told that he could accept actual expenses. Gordon dec. para. 8. Employee Gordon was also led to believe that use of the escrow account procedure endorsed by the

Court of Appeals would not keep him from violating the statute. Gordon dec. para. 11. Employee Fager did not receive a response to his query about whether payment for his speech activity was prohibited until the day before he had to leave to deliver his lecture. Even then, he was not told that the lecture was not covered by the statute because he had agreed to deliver it before the effective date of the statute. Fager dec. para. 4.

Respectfully submitted,

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Dated at Washington, D.C.
this 30th day of April, 1991.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Nos. 90-2922 (TPJ), 90-3044 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

PETER G. CRANE, ET AL.,

PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

**DEFENDANTS' RESPONSE TO PLAINTIFFS' JOINT
STATEMENT OF MATERIAL FACTS NOT IN DISPUTE**

Pursuant to Local Rule 108(h), defendants submit this Response to Plaintiffs' Joint Statement of Material Facts Not in Dispute. We do not believe there are any material facts as to which there is a genuine issue necessary to be tried. However, some of the facts set forth in plaintiffs' Statement are either inaccurate, unsupported or immate-

rial. Defendants respond to these statements of fact below. Those facts not specifically responded to are not disputed.

1. The second sentence states that certain NTEU members and non-member employees "receive" income from speeches, articles, or appearances. This may be a typographical error. NTEU may have meant to say "received."

4. The statement that, prior to January 1, 1991, individual plaintiffs and affiants accepted compensation for a variety of articles, speeches and appearances is not supported by the record. Affiant Giunta does not allege that he has accepted such compensation. Plaintiffs' Exhibit 12.

5. The statement that individual plaintiffs and affiants engaged in their writing, speaking, and public appearances on their nonwork time is not supported by the record. The declarations of Fager, Fishell, Giunta, Gordon and Jackson do not state that these affiants engaged in this activity on nonwork time. Plaintiffs' Exhibits 8, 10, 11, 12, 13, 17.

The statement that their (individual plaintiffs and affiants) writing, speaking, and public appearances were unrelated to their official duties is not supported by the record. Affiant Deutsch's writing on business and economics issues is closely related to, if not overlapping of, his work as business editor and senior writer/correspondent on economics for the Voice of America. Plaintiffs' Exhibit 7. Affiant Hanna states that, if an article she writes is directly related to her government work, she does not accept compensation for it, suggesting that some of her writing is related to her official duties. Plaintiffs' Exhibit 16. Affiant Mark's writing, listed on his attached resume, is closely related to, if not overlapping of, his writing as an Air Force historian. Plaintiffs' Exhibit 20.

The statement that the employing agencies of some of the plaintiffs and affiants had applied conflict of interest regulations in effect prior to January 1, 1991 and concluded that their writing, speaking and public appearances did not result in a conflict of interest or an apparent conflict of interest is not supported by each of the cited declarations or affidavits. The Fishell and Hanna declarations state and the Mark declaration implies that their agencies authorized them to engage in their writing or speaking, but do not state that their agencies specifically applied the conflict of interest rules and concluded that no conflict or apparent conflict existed. The Putnam declaration does not state that he sought agency authorization for his writing.

7. Plaintiffs do not paraphrase 5 C.F.R. § 735.203 accurately. The regulation speaks for itself, but, for example, § 735.203(c) prohibits only Presidential employees covered by § 401(a) of E.O. 11122 from receiving compensation or anything of monetary value for any consultation, lecture, discussion, writing, or appearance the subject matter of which is devoted substantially to the responsibilities, programs, or operations of his agency.

8. Plaintiffs do not paraphrase 5 C.F.R. § 735.203(c) accurately. The regulation speaks for itself, but § 735.203(c) provides that employees are encouraged to engage in teaching, lecturing, and writing but only if it is not prohibited by law, E.O. 11122, 5 C.F.R. Part 735 and agency regulations.

9. Plaintiffs do not fully quote the definition of honorarium in 5 U.S.C. § 505(3).

13. Plaintiffs do not fully state the definition of honorarium contained in the Office of Government Ethics Regulations. 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(a)). Plaintiffs' statement that receipt of payment is prohibited when the writing or speaking results in

no real or apparent conflict of interest with the employees' official duties is a legal conclusion, rather than a statement of fact, and is inconsistent with Congress' judgment that the receipt of honoraria generally creates an appearance of impropriety.

14. This is not a material statement of fact.

15. This is not a material statement of fact.

16. The statement that, before January 1, 1991, plaintiff NTEU Chapter 143 regularly published a newsletter is not supported by the record. Affiant Giunta states that, as a result of an inadequate level of voluntary participation by chapter members, the newsletter failed to publish regularly and was dropped altogether on several occasions, most recently about a year ago. Plaintiffs' Exhibit 12, ¶ 4.

17. The statement that the employee hired by Chapter 143 to write its newsletter is barred by the Ethics Reform Act from accepting compensation for producing the newsletter is a legal conclusion and is incorrect. The Ethics Reform Act, as interpreted by the Office of Government Ethics, does not prohibit federal employees from receiving compensation for producing or creating a newsletter, which is considered a publication made up of a number of individual articles and announcements and may also contain pictures and graphics, the total production of which includes not only writing, but editing, design and layout skills.

18. Plaintiffs' statement that Chapter 143 has been unable to publish its newsletter since January 1, 1991, to the extent it implies that the Ethics Reform Act is the cause of this inability, is inaccurate, for the reasons stated *supra*.

19. To the extent that "other expenses of a capital nature" includes college or post-graduate education, see Plaintiffs' Exhibit 11, ¶ 4 (Fishell—five or six years of theological education); Plaintiffs' Exhibit 15, ¶ 4

(Grant—11 years of college and graduate school), the statement is not supported in the record or consistent with the first sentence of plaintiffs' paragraph 19. These educational expenses were not incurred in the course of writing or speaking.

20. Plaintiffs' statement that Crane took an extended leave without pay in order to pursue his research is inaccurate because it is incomplete. Plaintiff Crane also stated that he took as extended period of leave without pay to spend more time with his family. Plaintiffs' Exhibit 6, ¶ 3.

25. The statement that some plaintiffs and affiants cannot afford to continue writing or speaking, at least at current levels, without compensation is not supported by the statements cited. Declarant Gordon evidently can afford to continue writing or speaking at current levels without compensation as he is not now reducing his speaking activities. Plaintiffs' Exhibit 13, ¶ 15. Declarant Gordon stated that, if the inability to receive payment for speech becomes permanent, he will have to significantly reduce his speaking activities. *Id.* Affiant Shelton, in an affidavit dated December 15, 1990, stated that he was in the predicament of choosing between his job and his writing. Since he submitted his affidavit, Office of Government Ethics regulations have been issued which would permit Shelton to recover actual and necessary travel expenses for his writing, 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(a)(4)). Because affiant Shelton has not submitted an updated affidavit, it is unknown what effect the Act and implementing regulations have on his writing activities.

Plaintiffs' statement that some plaintiffs have already or will soon abandon their unpaid expressive activity for other, paid part-time employment is not supported by the statements cited. Declarant Kennedy stated that, if the

honorarium provision is not struck down, she will be forced to close her professional writing business. Plaintiffs' Exhibit 19, ¶ 3. Declarant Hanna stated that she would rather devote her time and energy to projects for which she can still receive compensation, Plaintiffs' Exhibit 11, ¶ 11, and that preparatory time and travel time entailed in speaking are better spent on income producing efforts. Plaintiffs' Exhibit 11, ¶ 13. Neither declarant stated that they had already embarked on other, paid part-time employment.

28. Plaintiffs' statement that affiant Jackson will temporarily continue to write or speak without compensation in order to protect his credentials and with the intention of resuming compensated expression as soon as legally permitted is not supported in the record. Jackson's Declaration states that he continued writing for the *Post*, but does not say that he did so to protect his credentials. In addition, Jackson states that he would probably continue to lecture and write about dance without pay. Plaintiffs' Exhibit 17, ¶¶ 6, 7.

30. Except for the statement relating to plaintiff Hanna, none of the statements in this paragraph are supported by the record. Plaintiff Mark does not state that his career depends on continued publication of scholarly articles. Plaintiff Kennedy does not state that she writes to develop credentials for a planned career change. The remaining statements in the paragraph are similarly unsupported.

32. Plaintiffs' statement that some agency ethics officials have distributed incomplete information to employees is not supported in the record. Affiant Gordon asked his agency ethics official whether he could receive a payment for his lectures. Plaintiffs' Exhibit 13, Exhibit A. He did not inquire as to what expenses were recoverable and, therefore, the official's failure to respond to these

issues cannot be regarded as an incomplete response. Affiant Fager asked his agency ethics official whether he could receive an honorarium for a speech, but did not tell the officer that he agreed to deliver the speech prior to January 1, 1991, Plaintiffs' Exhibit 8, Exhibit A. The officials' response, based on only a partial statement of the relevant facts, cannot therefore be regarded as incomplete.

Respectfully submitted,

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Dated: May 20, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Nos. 90-2922 (TPJ), 90-3044 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
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v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

PETER G. CRANE, ET AL.,
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v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

DEFENDANTS' STATEMENT OF MATERIAL FACTS
NOT IN DISPUTE

Pursuant to Local Rule 108(h), defendants submit the following Statement of Material Facts Not in Dispute in support of their cross-motion for summary judgment.

1. Plaintiffs in Civil Action 90-2922 are: the National Treasury Employees Union ("NTEU"), which represents a certified class of all "employees," as defined in regulations to be codified at 5 C.F.R. § 2636.102(c) and (d), below grade GS-16 who, but for 5 U.S.C. app. § 501(b), would receive "honoraria," as defined in 5 U.S.C. app. § 505(3);

NTEU Chapter 143; Jan Adams Grant and Thomas C. Fishell.

2. Plaintiffs in Civil Action 90-3044 are: Peter G. Crane, Richard Deutsch, Charles E. Fager, William H. Feyer, Robert A. Gordon, Dr. Judith L. Hanna, Dr. George J. Jackson, Sharon Kennedy, Eduard Mark, and Arnold A. Putnam.

3. Plaintiffs in Civil Action 90-2922 and 90-3044 and the certified class in Civil Action 90-2922 are employees of the Executive Branch of the federal government.

4. Defendants in both Civil Action 90-2922 and 90-3044 are the United States of America; Richard Thornburgh, the Attorney General of the United States; the Office of Government Ethics and Stephen D. Potts, Director of the Office of Government Ethics.

5. In the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, Congress enacted legislation which prohibited all elected or appointed officers or employees of any branch of the federal government from accepting an honorarium over \$1,000 per appearance, speech or article and from accepting over \$15,000 in honoraria during any year.

6. In the Federal Election Campaign Act of 1976, Pub. L. No. 94-283, Congress raised the permissible limit on honoraria to \$2,000 per speech, appearance or article and \$25,000 annually. In Pub. L. No. 97-51, Congress eliminated the requirement that federal officers or employees accept no more than \$25,000 in honoraria annually. See 2 U.S.C. § 441i (1988).

7. On November 30, 1989, Congress enacted the Ethics Reform Act of 1989, Pub. L. No. 101-194 (the "Act").

8. Title VI of the Act ("Title VI") amended § 501(b) of the Ethics in Government Act of 1978 to provide: "An in-

dividual may not receive any honorarium while that individual is a Member, officer or employee." 5 U.S.C. app. § 501(b).

9. The term "Member" means "a representative in, or a Delegate or Resident Commissioner to, the Congress." 5 U.S.C. app. § 505(1).

10. The term "officer or employee" means "any officer or employee of the Government except (A) any individual (other than the Vice President) whose compensation is disbursed by the Secretary of the Senate or (B) any special Government employee (as defined in section 202 of title 18, United States Code). 5 U.S.C. app. § 505(2).

11. 5 U.S.C. app. § 505(b) amended 2 U.S.C. § 441i to limit its applicability only to Senators or officers or employees of the Senate.

12. Title VI took effect on January 1, 1991. 2 U.S.C. § 31-1 note.

13. The term "honorarium" means, in pertinent part, "a payment of money or any thing of value for an appearance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative) . . ." 5 U.S.C. app. § 505(3).

14. An honorarium which is paid on behalf of any Member, officer or employee to a charitable organization is deemed not to have been received by the Member, officer or employee. 5 U.S.C. app. § 501(c). No payment to a charitable organization shall exceed \$2,000 or be made to an organization from which the individual or a parent, sibling, spouse, child, or dependent relative derives any financial benefit. *Id.*

15. The Attorney General may bring a civil action against any individual who violates 5 U.S.C. app. § 501(b). The individual may be assessed a civil penalty of

not more than \$10,000 or the amount of compensation, if any, whichever is greater. 5 U.S.C. app. § 504(a).

16. The Office of Government Ethics ("OGE") is authorized to issue rules and regulations implementing Title VI with respect to officers and employees of the executive branch. 5 U.S.C. app. § 503(2).

17. The OGE published interim final regulations implementing relevant portions of Title VI on January 17, 1991. 56 Fed. Reg. 1721 (to be codified at 5 C.F.R. § 2636.101 - .205).

18. The OGE and designated agency ethics officials are authorized to render advisory opinions as to whether specific conduct which has not yet occurred would violate any provision of Title VI. Any individual to whom such an advisory opinion is rendered and any other individual covered by Title VI who is involved in a fact situation which is indistinguishable in all material respects, and who, after the issuance of such advisory opinion, acts in good faith in accordance with its provisions and findings shall not, as a result of such actions, be subject to any sanction under 5 U.S.C. app. § 504(a). 5 U.S.C. app. § 504(b); see 56 Fed. Reg. 1723-24 (to be codified at 5 C.F.R. § 2636.103).

19. The OGE regulations provide that "honorarium" does not include the payment of money or things of value listed in 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(a)(1)-(12)), which include: meals and other incidents of attendance, actual and necessary travel expenses for the employee and one relative incurred in connection with an appearance or speech or the writing of or publication of an article, actual expenses in the nature of typing, editing and reproduction costs incurred in connection with the making of an appearance or speech or the writing or publication of an article, and compensation

for goods or services other than appearing, speaking or writing even though making an appearance or speech or writing an article may be an incidental task associated with provision of the goods or services.

20. OGE regulations define "appearance" at 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(b)) and exclude from the definition "performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display."

21. OGE regulations define "speech" at 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(c)) and exclude from the definition "the recitation of scripted material, as for a live or recorded theatrical production, or any oral presentation that is an incident of any performance that is excluded from the definition of appearance . . . It does not include the conduct of worship services or religious ceremonies."

22. OGE regulations define "article" at 56 Fed. Reg. 1726 (to be codified at 5 C.F.R. § 2636.203(d)) and excludes from the definition "works of fiction, poetry, lyrics or script."

23. Assuming compliance with all other relevant ethics laws and regulations, Title VI and implementing regulations do not prohibit Members, officers or employees from receiving compensation for producing a newsletter, which is considered a publication made up of a number of individual articles and announcements and may also contain pictures and graphics, the total production of which includes not only writing, but editing, design, and layout skills. See 56 Fed. Reg. 1725, 1726 (to be codified at 5 C.F.R. § 2636.203(a)(6); 5 C.F.R. § 2636.203(d)).

24. Assuming compliance with all other relevant ethics laws and regulations, Title VI and implementing regulations do not prohibit Members, officers or employees

from receiving compensation for conducting worship services or religious ceremonies. 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(c)).

25. Assuming compliance with all other relevant ethics laws and regulations, Title VI and implementing regulations do not prohibit Members, officers or employees from receiving compensation for singing at weddings and other public forums. 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(b)).

26. Prior to the enactment of Title VI, many declarants and plaintiffs bore considerable actual, capital and opportunity costs to prepare for and engage in writing articles, delivering speeches and making appearances. Plaintiffs' Exhibit 6, ¶¶ 3, 5 (Crane); Exhibit 7, ¶ 14 (Deutsch); Exhibit 11, ¶ 4 (Fishell); Exhibit 13, ¶¶ 13, 14 (Gordon); Exhibit 15, ¶ 4 (Grant); Exhibit 16, ¶ 12 (Hanna); Exhibit 18, ¶ 7 (Kennedy); Exhibit 19, ¶ 4 (Kennedy); Exhibit 20, ¶ 4 (Mark); Exhibit 21, ¶ 5 (Putnam); Exhibit 23, ¶ 5 (Vastine).

27. Prior to and following the enactment of Title VI, officers and employees have not and are generally not permitted to engage in non-government work while on duty. See 5 C.F.R. § 735.205.

28. Many plaintiffs and declarants expended or were willing to expend the actual, capital and opportunity costs indicated in paragraph 26 without a contractual or other guarantee that their efforts would yield payments for speeches, articles or appearance. Plaintiffs' Exhibit 6, ¶ 7 (Crane); Exhibit 7, ¶ 14 (Deutsch); Exhibit 20, ¶ 4 (Mark).

29. Many plaintiffs and declarants received relatively small honoraria per speech, article or appearance. Plaintiffs' Exhibit 7, ¶ 7 (Deutsch – received \$100 per article ten years ago); Exhibit 8, ¶ 2 (Fager); Exhibit 13, ¶ 3 (Gordon); Exhibit 16, ¶ 3 (Hanna); Exhibit 20, ¶ 3 (Mark); Exhibit 21, ¶ 3 (Putnam).

30. Many plaintiffs and declarants received relatively small amounts of honoraria annually. Plaintiffs' Exhibit 10, ¶ 8 (Fishell); Exhibit 14, ¶ 9 (Grant); Exhibit 17, ¶ 5 (Jackson); Exhibit 18, ¶ 4 (Kennedy).

31. When accounting for actual, capital and opportunity costs, many declarants and plaintiffs did not earn an economic profit on writing articles, giving speeches and making appearances.

32. Many plaintiffs and declarants have engaged in and now engage in writing and speaking for non-monetary reasons. Plaintiffs' Exhibit 6, ¶ 5 (Crane); Exhibit 7, ¶ 9 (Deutsch); Exhibit 13, ¶¶ 2, 14 (Gordon); Exhibit 17, ¶ 4 (Jackson); Exhibit 20, ¶ 5 (Mark).

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Dated: May 20, 1991

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v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

PETER G. CRANE, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

**PLAINTIFFS' RESPONSE TO DEFENDANTS'
STATEMENT OF MATERIAL FACTS NOT IN DISPUTE**

Pursuant to Local Rule 108(h), plaintiffs submit this Response to Defendants' Statement of Material Facts Not in Dispute. Plaintiffs agree with defendants that there are no material facts as to which there is a genuine issue of fact that need to be resolved in an evidentiary hearing. However, some of the facts set forth in defendants' statement are inaccurate, unsupported or immaterial. Plaintiffs respond to those statements below. Those statements not specifically responded to are not in dispute.

2. The listing of plaintiffs in Civil No. 90-3044 is incorrect. Sharon Kennedy is an affiant, who is not a named plaintiff, in Civil No. 90-2922.

18. The statement that individuals who act in good faith in accordance with advisory opinions by the Office of Government Ethics and agency ethics officers shall not be subject to any sanction under 5 U.S.C. app. 504(a) is incorrect. The President, in signing the bill into law, stated that he viewed "as advisory the provisions allowing officials lacking executive powers to issue interpretative opinions purporting to insulate Federal employees from the consequences of potentially violative acts." 1989 U.S. Code Cong. & Admin. News 1225.

23. The statement that Title VI and implementing regulations do not prohibit the receipt of compensation for "producing a newsletter" is unsupported and immaterial. No named plaintiff is engaged in producing a newsletter as described by defendants. The government employee paid by plaintiff Chapter 143 to write articles for the Chapter's newsletter had no responsibility for editing, design, or layout.

24. The statement that Title VI and implementing regulations permit compensation for conducting worship services or religious ceremonies is incomplete. OGE regulations state that a minister may not accept payment "for offering a prayer at the opening of a convention or for delivering a sermon during a worship service conducted by another minister." 56 Fed. Reg. 1726, Sec. 2636.203(c), Example 2.

28. The statement that many plaintiffs and declarants expended or were willing to expend considerable actual, capital and opportunity costs connected with writing, speaking, or public appearances without a contractual or other guarantee that their efforts would yield payment for speeches, articles or appearances is immaterial. It is also

an overbroad generalization. Defendants cite to the affidavits of only three plaintiffs, one of whom stated that he was approached by editors to write articles. Had he been able to accept the offer, his expenses would have been incurred pursuant to a guarantee of payment. Deutsch dec. para. 10, 11. Certain other plaintiffs and affiants write or speak pursuant to contractual or other types of established commitments. Fager dec. para. 2; Feyer dec. para. 4, 6, 7; Fishell aff. para. 3, 5, 6. Others write pursuant to an on-going, albeit free-lance, relationship with a newspaper, magazine, or wire service. Shelton aff. para. 2, 3; Jackson dec. para. 2.

29. The statement that many plaintiffs and declarants received relatively small honoraria per speech, appearance or appearance is immaterial.

30. The statement that many plaintiffs and declarants received relatively small amounts of honoraria annually is immaterial.

31. The statement that many declarants and plaintiffs did not earn an economic profit from writing, speaking, or appearances when actual, capital and opportunity costs are included is immaterial and unsupported in the record.

Respectfully submitted,

PETER G. CRANE, *et al.*,

NATIONAL TREASURY
EMPLOYEES UNION, *et al.*,

/s/ John Vanderstar

/s/ Gregory O'Duden

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-3027 (TPJ)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

DEFENDANTS' STATEMENT OF MATERIAL FACTS NOT IN
DISPUTE

Pursuant to Local Rule 108(h), defendants submit the following Statement of Material Facts Not in Dispute in support of their cross-motion for summary judgment.

1. Plaintiffs in this action are the American Federation of Federal Employees, AFL-CIO and David E. Hubler.

2. Plaintiff David Hubler is an employee in the Executive Branch of the federal government.

3. Defendants in this action are the United States of America; Richard Thornburgh, the Attorney General of the United States, and Stephen D. Potts, Director of the Office of Government Ethics.

4. In the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, Congress enacted legislation which prohibited all elected or appointed officers or

employees of any branch of the federal government from accepting an honorarium over \$1,000 per appearance, speech or article and from accepting over \$15,000 in honoraria during any year.

5. In the Federal Election Campaign Act of 1976, Pub. L. No. 94-283, Congress raised the permissible limit on honoraria to \$2,000 per speech, appearance or article and \$25,000 annually. In Pub. L. No. 97-51, Congress eliminated the requirement that federal officers or employees accept no more than \$25,000 in honoraria annually. *See* 2 U.S.C. § 441i (1988).

6. On November 30, 1989, Congress enacted the Ethics Reform Act of 1989, Pub. L. No. 101-194 (the "Act").

7. Title VI of the Act ("Title VI") amended § 501 (b) of the Ethics in Government Act of 1978 to provide: "An individual may not receive any honorarium while that individual is a Member, officer or employee." 5 U.S.C. app. § 501(b).

8. The term "Member" means "a representative in, or a Delegate or Resident Commissioner to, the Congress." 5 U.S.C. app. § 505(1).

9. The term "officer or employee" means "any officer or employee of the Government except (A) any individual (other than the Vice President) whose compensation is disbursed by the Secretary of the Senate or (B) any special Government employee (as defined in section 202 of title 18, United States Code). 5 U.S.C. app. § 505(2).

10. 5 U.S.C. app. § 505(b) amended 2 U.S.C. § 441i to limit its applicability only to Senators or officers or employees of the Senate.

11. Title VI took effect on January 1, 1991. 2 U.S.C. § 31-1 note.

12. The term "honorarium" means, in pertinent part, "a payment of money or any thing of value for an appear-

ance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative) . . ." 5 U.S.C. app. § 505(3).

13. An honorarium which is paid on behalf of any Member, officer or employee to a charitable organization is deemed not to have been received by the Member, officer or employee. 5 U.S.C. app. § 501(c). No payment to a charitable organization shall exceed \$2,000 or be made to an organization from which the individual or a parent, sibling, spouse, child, or dependent relative derives any financial benefit. *Id.*

14. The Attorney General may bring a civil action against any individual who violates 5 U.S.C. app. § 501(b). The individual may be assessed a civil penalty of not more than \$10,000 or the amount of compensation, if any, whichever is greater. 5 U.S.C. app. § 504(a).

15. The Office of Government Ethics ("OGE") is authorized to issue rules and regulations implementing Title VI with respect to officers and employees of the executive branch. 5 U.S.C. app. § 503(2).

16. The OGE published interim final regulations implementing relevant portions of Title VI on January 17, 1991. 56 Fed. Reg. 1721 (to be codified at 5 C.F.R. § 2636.101 - .205).

17. The OGE and designated agency ethics officials are authorized to render advisory opinions as to whether specific conduct which has not yet occurred would violate any provision of Title VI. Any individual to whom such an advisory opinion is rendered and any other individual covered by Title VI who is involved in a fact situation which is indistinguishable in all material respects, and who, after the issuance of such advisory opinion, acts in good faith in accordance with its provisions and findings shall not, as a result of such actions, be subject to any

sanction under 5 U.S.C. app. § 504(a). 5 U.S.C. app. § 504(b); see 56 Fed. Reg. 1723-24 (to be codified at 5 C.F.R. § 2636.103).

18. The OGE regulations provide that "honorarium" does not include the payment of money or things of value listed in 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(a)(1)-(12)), which include: meals and other incidents of attendance, actual and necessary travel expenses for the employee and one relative incurred in connection with an appearance or speech or the writing of or publication of an article, actual expenses in the nature of typing, editing and reproduction costs incurred in connection with the making of an appearance or speech or the writing or publication of an article, and compensation for goods or services other than appearing, speaking of writing even though making an appearance or speech or writing an article may be an incidental task associated with provision of the goods or services.

19. OGE regulations define "appearance" at 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(b)) and exclude from the definition "performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display."

20. OGE regulations define "speech" at 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(c)) and exclude from the definition "the recitation of scripted material, as for a live or recorded theatrical production, or any oral presentation that is an incident of any performance that is excluded from the definition of appearance . . . It does not include the conduct of worship services or religious ceremonies."

21. OGE regulations define "article" at 56 Fed. Reg. 1726 (to be codified at 5 C.F.R. § 2636.203(d)) and excludes from the definition "works of fiction, poetry, lyrics or script."

22. Assuming compliance with all other relevant ethics laws and regulations, Title VI and implementing regulations do not prohibit Members, officers or employees from receiving compensation for any article accepted for publication prior to January 1, 1991, or for any speech made or article written in satisfaction of the employee's obligation under a contract entered into prior to January 1, 1991. 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(a)(12)).

23. Assuming compliance with all other relevant ethics laws and regulations, Title VI and implementing regulations do not prohibit Members, officers or employees from receiving compensation for reprinted articles if the original article was written in satisfaction of the employee's obligation under a contract entered into prior to January 1, 1991 and that contract provided that the employee would be compensated for any reprinted articles that might subsequently be published. See 56 Fed. Reg. 1725 (to be codified at 5 C.F.R. § 2636.203(a)(12)).

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

JAY B. STEPHENS
United States Attorney

/s/ Mary E. Goetten

MARY E. GOETTEN

/s/ Jeffrey S. Gutman

JEFFREY S. GUTMAN

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Attorneys for Defendants

Dated: May 22, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA No. 90-3027 (TPJ)

Consolidated With CA No. 90-2922, CA No. 90-3044

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF
MATERIAL FACTS NOT IN DISPUTE

Pursuant to Local Rule 108(h), plaintiffs submit this Response to Defendants' Statement of Material Facts Not in Dispute. As defendants recognize, there are no material facts relating to the issues before this Court as to which there is a genuine issue necessary to be tried. However, certain statements in Defendants' Response to Plaintiffs' Statement of Material Facts are either inaccurate, unsupported or immaterial. Plaintiffs reply to those statements below:

2 and 6. Defendants' characterization of plaintiffs' synopsis of Title VI as inaccurate is not entirely correct. While 5 U.S.C. app. § 505(2) does exclude Senate and special government employees from the definition of "employee" in 5 U.S.C. app. § 505(b), the exceptions are

minuscule components of the vast federal workforce, all of whom are currently subject to the honorarium restriction. In addition, contrary to defendants suggestion, plaintiffs did not state that the statutory penalty of a \$10,000 fine was mandatory. The fact remains, however, that the statute does prescribe this severe sanction for violation of the honorarium provision.

7. The "interim" regulations implementing 5 U.S.C. § 501-505 at 56 Fed. Reg. 1721 are not final. In promulgating these regulations, the Office of Government Ethics expressly requested comments by interested parties for consideration "in formulating a final rule." 56 Fed. Reg. 1722.

8. The interim regulations were issued without explanation as to the need or evidentiary support for such restrictions on the expressive activities of federal employees.

18. Plaintiff Hubler's contact with editors is a direct consequence of his efforts to publish his written articles. In Mr. Hubler's case, absent the receipt of income for publication, he will no longer be able to engage in the type of writing which he enjoys.

Respectfully submitted,

/s/ Mark D. Roth

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/s/ Anne M. Wagner

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IN THE UNITED STATES DISTRICT COURT
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STATEMENT OF MATERIAL FACTS OVER WHICH THERE
EXISTS NO GENUINE DISPUTE

Pursuant to Local Rule 108(h), and in support of their motion for summary judgment, plaintiffs submit the following statement of material facts over which there can be no genuine dispute:

1. In November, 1989, Congress enacted Title VI of the Ethics Reform Act of 1989, Pub. L. 101-194, ("the Act"), which became effective January 1, 1991.

2. Title VI of the Act, amending Title V of the Ethics in Government Act of 1978, prohibits the receipt of honoraria by all federal employees, under the pain of civil prosecution by the Attorney General and a penalty of \$10,000. 5 U.S.C. app. § 504.

3. Specifically, Title VI amends § 501(b) and (c) of the earlier legislation to read:

(b) **HONORARIA PROHIBITION.**—An individual may not receive any honorarium while that individual is a Member, officer or employee.

(c) **TREATMENT OF CHARITABLE CONTRIBUTIONS.**—Any honorarium which, except for subsection (b), might be paid to a Member, officer or employee, but which is paid instead on behalf of such Member, officer or employee to a charitable organization, shall be deemed not to be received by such Member, officer or employee. No such payment shall exceed \$2000 or be made to a charitable organization from which such individual or a parent, sibling, spouse, child, or dependent relative of such individual derives any financial benefit.

4. The Act defines "honorarium" as "a payment of money or anything of value for an appearance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative)" 5 U.S.C. app. § 505(3).

5. An "officer or employee" is therein defined as "any officer or employee of the Government except (A) any individual (other than the Vice President) whose compensation is disbursed by the Secretary of the Senate or (b) any special Government employee (as defined in section 202 of title 18, United States Code)." 5 U.S.C. app. § 505(2).

6. Under the Act, *any* federal employee who has received payment or thing of value for *any* speech, appearance, or article may be fined up to \$10,000 pursuant to a civil action brought by the Attorney General. 5 U.S.C. app. § 504.

7. On January 17, 1991, the Office of Government Ethics, pursuant to authority established under 5 U.S.C. app. § 503, published proposed regulations construing, in part, the honorarium ban of Title VI of the Act. 56 Fed.

Reg. 1721 (Jan. 17, 1991), Plaintiffs' Exhibit ("Pls.' Ex") A.

8. Without explanation, the regulations include certain expressive activities within the ban's scope, while excluding others. For instance, an employee may receive payment for a fictional, but not a nonfictional, article. 56 Fed. Reg. at 1726. "Appearance" means "attendance at a public or private conference, meeting, hearing, event or other gathering," but does not include "performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display." 56 Fed. Reg. at 1725.

9. The American Federation of Government Employees, AFL-CIO, ("AFGE") is a federal employee union representing "employees," as defined in Title VI. Affidavit of Allen Kaplan, Secretary-Treasurer of the American Federation of Government Employees, AFL-CIO, par. 3, Pls.' Ex. B.

10. David Hubler, a member of the bargaining unit represented by AFGE Local 1812, is currently employed by the Voice of America ("VOA" or "agency") as a GS-13 features writer. Affidavit of David E. Hubler ("Hubler Aff."), par. 1, Pls.' Ex. C.

11. Hubler has been employed by VOA for thirteen years and has been a federal employee for twenty-four years. Hubler Aff., par. 1. His work for the agency involves writing book reviews and pieces about American life for broadcast over VOA International radio. *Id.*

12. One of Mr. Hubler's interests, which he pursues during his off-duty hours, is writing magazine and newspaper articles on travel and other topics on a freelance basis. Hubler Aff., par. 2.

13. Hubler has been engaged in this work since 1979 with the knowledge and approval of his supervisors at VOA. Hubler Aff., par. 2-3.

14. David Hubler receives approximately \$500 to \$1,500 per article, depending upon the length of the article. Hubler Aff., par. 4. In any given year, he earns an average of \$2,000 as a result of his off-duty writing. *Id.*

15. Previous to becoming aware of the Ethics in Government Act of 1989, he had every expectation of continuing to publish articles similarly unrelated to his duties as a VOA employee and receiving payment for such publication after January 1, 1991. Hubler Aff., par. 5.

16. At least one article written in 1990 is scheduled to be published in March, 1991. Hubler Aff., par. 5. Moreover, some of his previously published articles will be reprinted after January 1, 1991, for which he is scheduled to receive payment. *Id.*

17. The expenses which Mr. Hubler incurs in order to pursue his off-duty writing extend beyond those that merely cover transportation and lodging. Hubler Aff., par. 7. A prohibition against receipt of such expenses will impair his ability to engage in the type of activities about which he writes. *Id.*

18. During the ten years that Hubler has been travel writing, he has cultivated and developed credibility with, and a reputation among, the community of editors who determine whether his work gets published. Hubler Aff., par. 8. The Act's prohibition will effectively remove him from contact with this community which will, in turn, adversely affect his ability to write and publish travel articles now and upon his retirement from federal service for which he is eligible in September, 1991. *Id.*

Respectfully submitted,

/s/ Mark D. Roth

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/s/ Anne M. Wagner

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IN THE UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA, ET AL.,
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**DEFENDANTS' RESPONSE TO PLAINTIFFS'
STATEMENT OF MATERIAL FACTS NOT IN DISPUTE**

Pursuant to Local Rule 108(h), defendants submit this Response to Plaintiffs' Statement of Material Facts Not in Dispute. We do not believe there are any material facts as to which there is a genuine issue necessary to be tried. However, some of the facts set forth in plaintiffs' Statement are either inaccurate or unsupported. Defendants respond to these statements of fact below. Those facts not specifically responded to are not disputed.

2. Plaintiffs' synopsis of Title VI is inaccurate. 5 U.S.C. app. § 501(b), which is only part of Title VI, does not prohibit the receipt of honoraria by all federal employees, but only by Members, Officers or employees as defined in 5 U.S.C. app. §§ 505(1), (2). Plaintiffs also inaccurately paraphrase the civil penalty provision. That provision, 5 U.S.C. § 504(a), does not require that viola-

tors of § 501(b) be assessed a civil penalty of \$10,000. Rather, the provision states that "the court in which such [civil penalty] action is brought may assess against such individual a civil penalty of not more than \$10,000 or the amount of compensation, if any, which the individual received for the prohibited conduct, whichever is greater."

6. Plaintiffs' statement that any federal employee may be subject to a civil penalty action is inaccurate. As stated in ¶ 2, only Members, officers or employees as defined in 5 U.S.C. §§ 505(1) and (2), rather than every federal employee, are subject to § 501(b).

7. Plaintiffs' statement that, on January 17, 1991, the Office of Government Ethics published proposed regulations is inaccurate. The regulations published on January 17, 1991 were interim regulations with a request for comments. 56 Fed. Reg. 1721.

8. Plaintiffs' statement that the regulations were issued without explanation is inaccurate. The preamble to the regulations is at 56 Fed. Reg. 1721-22 (Jan. 17, 1991). Specifically, it explains that the definitions of appearance, speech, and article are similar, but not identical, to definitions contained in the Federal Election Commission regulations, 11 C.F.R. § 110.12, which implement the honoraria restrictions in 2 U.S.C. § 441i.

13. The statement that Hubler has been engaged in free-lance writing with the approval of his supervisors at VOA is not supported by the record. Hubler's affidavit states only that his supervisors never expressed concern to him that his off-duty activities affected his duties as a federal employee. Hubler Aff., ¶ 3.

16. The statement that, at least one article written by Hubler in 1990 is scheduled to be published in March, 1991, is not accurate. It is now May, 1991 and that article either was or was not published. Plaintiffs do not say

whether the article was in fact published or not, or whether Hubler was paid for the article.

18. The statement made in the second sentence in the paragraph is not supported. The Act's prohibition may only effectively remove plaintiff Hubler from contact with his community of editors if he chooses not to write articles. Hubler has not alleged that he has chosen not to write articles and thus is not effectively removed from contact with these editors.

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

JAY B. STEPHENS
United States Attorney

/s/ Mary E. Goetten

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/s/ Jeffrey S. Gutman

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Attorneys for Defendants

Dated: May 22, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA No. 90-3027 (TPJ)

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DECLARATION OF ALLEN H. KAPLAN

I, ALLEN H. KAPLAN, hereby declare as follows:

1. I am the National Secretary-Treasurer of the American Federation of Government Employees, AFL-CIO. I have occupied that position since August 1986.

2. The American Federation of Government Employees, AFL-CIO (hereafter "AFGE"), is a non-profit, unincorporated association (labor organization) having its principal place of business at 80 F Street, N.W., Washington, D.C. 20001.

3. AFGE affiliated locals and councils are the exclusive bargaining representatives of approximately 690,000 federal employees. The employees within bargaining units represented by AFGE perform a wide variety of functions reflective of the broad expanse of federal government operations. For example, AFGE represents

units of nurses, fork lift operators, grave diggers, border patrol agents, clerk typists, federal protective officers, meat inspectors, and cowboys.

4. AFGE represents the employment interests of these and other federal employees throughout the world by negotiating collective bargaining agreements, filing unfair labor practice charges, lobbying Congress on matters affecting federal working conditions, pay and benefits, and litigating individual and collective rights of employees in administrative forums and federal and state courts.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and, if called to do so, I would so testify.

Executed this 6th day of May, 1991.

/s/ Allen H. Kaplan
 ALLEN H. KAPLAN
 National Secretary-Treasurer

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AFFIDAVIT OF DAVID E. HUBLER

1: My name is David E. Hubler. I am currently a GS-13 career employee of the Voice of America ("VOA"), a component of the United States Information Agency, located at 330 Independence Avenue, S.W., Room 3446, Washington, D.C. 20547. I am also a member of the bargaining unit represented by Local 1812 of the American Federation of Government Employees. My duties involve writing book reviews and pieces about American life for broadcast over the Voice of America international radio. I have been employed by the VOA for 13 years and have been a federal employee for 24 years.

2. One of my interests unrelated to my employment which I pursue during my off-duty hours is writing. I have been writing and publishing magazine and newspaper articles on travel and other topics on a free-lance basis

since 1979. My travel writing has focused primarily on areas in the Caribbean and Florida.

3. I have been engaged in this off-duty work with the knowledge of my supervisors at VOA who never expressed concern to me that my off-duty activities in any way affected my duties as a federal employee.

4. I receive approximately \$500 to \$1,500 per article, depending upon the length of the article. In any given year, I earn an average of \$2,000 as a result of my off-duty writing. A listing of published articles which I have written accompanies this affidavit.

5. Previous to becoming aware of the Ethics in Government Act of 1989, I had every expectation of continuing to publish articles similarly unrelated to my duties as a Voice of America employee and receive payment for such publication after January 1, 1991. In 1990, I signed a contract to deliver an article by December 1990 for publication in the March 1991 edition of *New Dominion* Magazine on local breweries. I have not yet received payment for that article. One of my articles that originally appeared in a 1990 volume of *Caribbean Travel and Life*, and for which I was paid in 1990, was reprinted in the January/February 1991 issue of the American Eagles' inflight magazine. At least two other articles which I wrote are scheduled to be reprinted in the June/July 1991 issue of the American Eagles' inflight magazine and in the 10th Anniversary issue of *Islands* magazine in June 1991. Payment for such reprints normally occurs one month after the cover date of the volume in which the article appears.

6. The Act's prohibition against receipt of payment for my writings will effectively suppress my ability to write and publish articles. The normal procedure for publication of the type of article I write is that I call or send a query letter to a publication which may be interested in my idea for an article. If the publisher agrees, I will be asked

to sign a contract for such an article, with payment only upon acceptance or publication of the articles. Consequently, payment is not rendered as compensation for the travel expenses necessarily incurred in creating the article, but is nevertheless essential to my being able to underwrite such expenses.

7. Moreover, the expenses incurred in travel writing, for which I receive payment, extend beyond those that merely cover transportation and lodging. A prohibition against receipt of such expenses will impair my ability to engage in the type of activities about which I write.

8. During the 10 years that I have been travel writing, I have cultivated and developed a reputation among the community of editors who determine whether my work gets published. The Act's prohibition will effectively remove me from contact with this community which will, in turn, adversely affect my ability to write and publish travel articles now and upon my retirement from federal service for which I am eligible in September, 1991.

I declare under penalty of perjury that all of the information contained in this affidavit is true and correct to the best of my knowledge.

Date: May 7, 1991

/s/ David E. Hubler

DAVID E. HUBER

PLAINTIFFS' EXHIBIT F

United States
OFFICE OF GOVERNMENT ETHICS
Suite 500, 1201 New York Avenue, N.W.
Washington, D.C. 20005-3919

December 12, 1990

The Honorable Trent Lott
U.S. Senate
487 Senate Russell Office Bldg.
Washington, D.C. 20510-2403

Dear Senator Lott:

This is in response to your recent letter requesting that we review the status of Mr. David E. Hubler with regards to the honoraria ban contained within the Ethics Reform Act of 1989 (the Act), Pub. L. No. 101-194, § 601, 103 Stat. 1716, 1760-63 (1989). We had hoped that legislation introduced in the last days of the 101st Congress would have made our response a more positive one. Unfortunately, as mentioned later, that did not occur.

According to the information that you have provided to us, Mr. Hubler is full-time features writer for the Voice of America.¹ In his spare time Mr. Hubler is a freelance writer and novelist who has published two books and numerous magazine and newspaper articles, mostly travel and profile articles. Mr. Hubler also teaches freshman composition at the Annandale campus of the Northern Virginia Community College. Because of these outside activities, Mr. Hubler is very concerned over the effects of

¹ The information contained in this letter is derived from Mr. Hubler's letter to your office dated September 21, 1990.

the honoraria ban on his situation. Because his teaching involves lecturing for compensation and also grading and critiquing papers, Mr. Hubler wishes to know whether he will be able to continue this activity under the terms of the ban. In addition to his personal concerns, Mr. Hubler also believes that the Act, which he describes as "egregious legislation," has an unfair impact on the thousands of federal employees who write professionally. We concur with the concern expressed by Mr. Hubler over the effects of the honoraria ban on federal employees.

The new prohibition against the receipt of honoraria, contained in section 601(a) of the Act, defines the term "honorarium" as "a payment of money or anything of value for an appearance, speech or article by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative) to the extent that such expenses are paid or reimbursed by any other person, and the amount otherwise determined shall be reduced by the amount of any such expenses to the extent that such expenses are not paid or reimbursed." Pub. L. No. 101-194, § 601(a), 103 Stat. 1716, 1762 (1989). This section will become effective on January 1, 1991. *Id.*, § 603.

This prohibition will bar all Government employees from receiving honoraria for an appearance, speech or article even if the activity is not related to the employees' official duties. As Mr. Hubler recognizes in his letter, this ban will generally prevent him from writing for a publication for a fee. We note, however, that the honoraria ban will not prevent him from publishing a book; such an activity will not be considered publication of an "article" under the terms of the honoraria ban. We also note that the ban will not prevent Mr. Hubler from receiving compensation for teaching a course at an accredited educational institution such as the Northern Virginia Communi-

ty College. Such activity will not be considered an appearance or speech under the honoraria ban.² The honoraria ban will, however, significantly curtail Mr. Hubler's ability to derive outside income from his writings, even if these writings have no connection with his position with the Voice of America.

We believe that the honoraria ban will place an unnecessary hardship on government employees. I fully support the goal of reducing conflicts of interest and actual or apparent misuse of government employment. I have no reason to believe, however, that this aim has not been achieved by already existing restrictions governing the outside activities of executive branch employees. The executive branch has long-established regulations that prohibit executive branch employees from engaging in outside activities that are not compatible with the full and proper discharge of the duties and responsibilities of their Government employment. Executive Order 12674, § 101(j) (1989); 5 C.F.R. § 735.203(a); *see also* Executive Order 11222 (1965), § 202 (superseded by E.O. 12674). Incompatible activities include the acceptance of a fee or any other thing of monetary value in circumstances in which acceptance may result in, or create the appearance of, conflicts of interest, 5 C.F.R. § 735.203(a)(1), or any activity that may result in or create the appearance of using public office for private gain, Executive Order 12674, § 101(g); 5 C.F.R. § 735.201a(a). High-level officials are subject to additional restrictions. *See* 5 C.F.R. § 735.203(c); Exec.

² For your information we are enclosing an OGE memorandum (dated November 28, 1990) interpreting the honoraria ban and the outside earned income and employment restrictions contained in the Act. This memorandum also includes some discussion over the scope of the terms "appearance, speech or article" for the purposes of the honoraria ban.

Order 12674, § 102. Executive branch employees are also subject to a criminal statute, 18 U.S.C. § 209, prohibiting them from accepting anything of value as compensation for or as a supplement to the salary which they receive for their government duties. If generalized, the test under all of the various statutes and regulations in the executive branch for acceptance of an honorarium is, and will be through December 31, 1990, the following:

- (1) Is the honorarium offered for carrying out government duties?
- (2) Is the honorarium offered to the government employee or family member because of the official position held by the employee?
- (3) Is the honorarium offered because of the government information that is being imparted?
- (4) Is the honorarium offered by someone who does business with the employee in his or her official capacity?
- (5) Were any government resources or time expended by the employee to produce the materials for the article, speech or appearance?

If the answer to all of these questions is no, then an offered honorarium is acceptable, although it cannot exceed \$2000.

We believe that the presently existing restrictions have adequately protected the Government against the actual or apparent misuse of government employment by executive branch employees while allowing such employees some freedom of action. The total ban on honoraria in the Ethics Reform Act will stop that balancing of interests. This Office is therefore of the opinion that the goals of this section could have been achieved in a way that would impose less of a burden upon Government employees.

This result could still be accomplished if the statutory language is amended so that the prohibition attaches only when there is some nexus between the source of or the reason for the honoraria and an individual's official duties. Such a prohibition would bar employees from receiving honoraria that may create an actual or apparent conflict of interest while permitting employees to continue to receive honoraria where no actual or apparent conflict of interest exists. However, although the Senate added language to H.R. 2431 on October 26, 1990 which would amend the honoraria restriction in a manner that would have focused it on matters related to government service, the House did not act on the bill before adjourning. We expect that the issue will be raised early in the 102nd Congress.

If you have any further questions concerning the issues discussed in this letter, please feel free to contact me or my staff at 523-5377.

Sincerely,

/s/ Stephen D. Potts

STEPHEN D. POTTS
Director

Enclosure:
As stated

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 90-2922 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

SUPPLEMENTAL AFFIDAVIT OF CHARLES GIUNTA

1. I am an employee of the U.S. Customs Service in El Paso, Texas, Chief Steward and former President of NTEU Chapter 143, and President of NTEU District 16. After learning of this suit, I contacted David Klein, an NTEU attorney, to inform him that Chapter 143 was unable to find a qualified writer willing to work on its newsletter without pay after the previous writer, a Customs employee, became ineligible to accept compensation for his writing by reason of section 501(b) of the Ethics Reform Act of 1989. After this discussion, NTEU Chapter 143 became a party to this litigation, and I filed my previous affidavit in this case, explaining Chapter 143's predicament.

2. I understand that in this litigation, the government has suggested that our former writer could continue to write for the newsletter because producing a newsletter does not fall within the meaning of the ban on compensa-

tion for writing contained in section 501(b). Although I believe my previous affidavit made it clear that our writer was paid to write articles for the newsletter, and not to "produce" the entire newsletter, I wish to clarify that matter here in case any ambiguity remains.

3. Our former paid writer wrote most, but not all, of the articles in the newsletter. Other employees would occasionally submit articles for publication. Our former writer was not responsible for editing, arranging, laying out, printing, or producing the newsletter. Rather, he submitted typed copy to me. This copy would be retyped by a secretary, on NTEU time, using the Chapter's word processing equipment. I then personally edited the articles to ensure correct spelling and grammar. After I finished editing the articles, I selected the typeface and arranged and laid out the newsletter, using the Chapter's Xerox Ventura desktop publishing software. This required several evenings of my time each month. Then I sent the disk to a private contractor who laser-printed the newsletter. Our former writer was unfamiliar with the technology and software necessary to perform these activities, and performed no task other than writing the articles themselves.

I affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Date: 5/28/91

/s/ Charles Giunta
 CHARLES GIUNTA

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF COLUMBIA

Civ. No. 90-2922 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
 PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
 DEFENDANTS.

SUPPLEMENTARY AFFIDAVIT OF JAN ADAMS GRANT

1. I am an individual plaintiff in this litigation, and have filed a previous affidavit dated December 3, 1990. I am an Internal Revenue Service employee and a part-time speaker and writer of articles and books on environmental subjects.

2. As a speaker and writer, I am always paid for my public appearances or writing. I am not an employee of any of the persons or organizations that pay me for my expressive activity.

3. In the period since January 1, 1991, the effective date of the provision of the Ethics Reform Act which prohibits the acceptance of compensation for certain categories of writing, speaking and public appearances, I have been forced to curtail my First Amendment activities. I have stopped sending out query letters seeking publication of my written work, because I can no longer accept compensation for it under the terms of the Ethics Reform Act and implementing regulations. I have also stopped seeking opportunities to give paid addresses. I expect to

refrain from these expressive activities as long as the ban on compensated speech and writing remains in effect.

4. I believe that I am entitled to compensation for the time and effort I spend in researching and preparing speeches and articles. The expenses associated with this do not only include such day-to-day expenses as travel, typewriter paper, and the like, but also involve considerable capital investments that are not compensable under the Ethics Reform Act. I spent eleven years in college and graduate school obtaining bachelor's and master's degrees in geology and geophysics at considerable personal expense. I have invested approximately \$2000 in word processing equipment. I spend several hundred dollars annually subscribing to publications and purchasing literature relevant to my field of expertise, without which I feel I would be less informed and less qualified as an author. The Ethics Reform Act would force me to absorb these capital costs permanently, and to forgo the tax benefits of capital depreciation, as the price of continuing my uncompensated expressive activities.

5. While the inability to defray my capital investment in my part-time speaking and writing activities is a crucial imposition resulting from the Ethics Reform Act, my incentive to continue investing time in this work is also substantially reduced by the ban on compensated expression. The time I spend researching and writing articles, and preparing and delivering speeches, could readily be invested in a profitable activity. For example, I have an associate's degree in engineering graphics and have, in the past, earned money doing architectural drafting, an activity that, under current law, I could resume profitably instead of pursuing my writing career. Because I would be entitled to accept payment for these activities if the government has not determined to regulate this field, and because the law imposes economic disadvantages on me

for choosing speech over some other activity, I believe the ban constitutes an affirmative penalty on my choice to engage in First Amendment activities, and I find this singling out of my expressive activities for such a penalty extremely offensive.

I affirm on penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Date: 7-10-91

/s/ Jan Adams Grant

JAN ADAMS GRANT

SUPPLEMENTARY DECLARATION OF JUDITH L. HANNA

1. I am an Education Program Specialist for the United States Department of Education in Washington, D.C., and an individual plaintiff in this litigation. I submit this declaration to update the one I previously submitted in this case, which was filed with the Court as Exhibit 11 to Plaintiffs' Joint Motion for Summary Judgment.

2. By letter dated April 8, 1991, I wrote to my designated Agency Ethics Official seeking an advisory opinion on whether certain aspects of my writing and speaking activities are covered by the honoraria prohibition that took effect January 1, 1991. A copy of my letter is attached hereto as *Exhibit A*.

3. On or about May 30, 1991, I received a brief memorandum from Steven Y. Winnick, Designated Agency Ethics Official for the United States Department of Education. Mr. Winnick's memorandum acknowledges my April 8, 1991 letter. It then states: "Unfortunately, your posture as a plaintiff in a lawsuit against the United States regarding these provisions of the Act, renders me unable to respond to your inquiries. Accordingly, I am returning your letter." A copy of Mr. Winnick's memorandum is attached hereto as *Exhibit B*.

4. I have not received any further communications from the Department of Education regarding the issues and questions raised in my April 8, 1991 letter.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on July , 1991.

/s/ Judith L. Hanna

JUDITH L. HANNA

EXHIBIT A

UNITED STATES DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
Programs for the Improvement of Practice
Research Applications Division

555 New Jersey Avenue, NW, Suite 504
Washington, D.C. 20208

202-219-2266

April 8, 1991

Mr. Steven Y. Winnick
c/o Dan Meyers
U.S. Department of Education
Ethics Official
400 Maryland Ave., SW (Room 4191)
Washington, D.C. 20202

Dear Mr. Winnick:

I would appreciate a ruling about two matters related to the honorarium prohibition and limitations on outside earned income and employment.

First, my consulting activities have been approved. They typically consist of reviewing and commenting on manuscripts and proposed projects and programs, or needs assessment and evaluation, within my areas of expertise. I have received between \$100 and \$1000 for such services. Are there limitations on these activities?

Second, concerning articles and speeches, is the writer's/speaker's time spent to prepare articles or speeches considered an expense? If the writer/speaker hired someone to do the preparation, e.g., research, for a speech or article, this would obviously be an expense. Is travel time to and from the site of a speech considered an

expense? What are the limits on the amount per hour and per day that may be considered for expenses? How does one document expenses?

Sincerely,

Judith Lynne Hanna, Ph.D.

EXHIBIT B

[SEAL]

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE GENERAL COUNSEL
400 Maryland Ave., S.W., Washington, D.C. 20202-2110

[MAY 30, 1991]

MEMORANDUM

To : Judith Lynne Hanna
Research Applications Division
Programs for the Improvement of Practice
Office of Educational Research and
Improvement

FROM : Steven Y. Winnick
Designated Agency Ethics Official

SUBJECT: Advisory Opinion

This acknowledges your April 8, 1991 letter to me requesting an advisory opinion on two matters concerning the honorarium and outside earned income provisions of the Ethics Reform Act of 1989 (Act). Unfortunately, your posture as a plaintiff in a lawsuit against the United States regarding these provisions of the Act, renders me unable to respond to your inquiries. Accordingly, I am returning your letter.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 90-2922 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

AFFIDAVIT OF LAWRENCE W. FORD

1. I am employed by the United States Internal Revenue Service as a GS-12 appeals officer in the Richmond, Virginia, Appeals Office. I am a member of the National Treasury Employees Union ("NTEU") and a steward of NTEU Chapter 90. I have worked for the IRS for about 11 years.

2. On May 28, 1986, the IRS approved my request to engage in certain outside employment—specifically, to teach a commercial review course for certified public accountants, known as the Becker CPA Review Course. I have taught this course, along with two other individuals, since that time. I am not an employee of the Becker organization; rather, I operate as an independent contractor. Although I initially had a contractual arrangement with the organization, I now perform these services without a formal agreement. I receive approximately \$2000 to \$3000 a year from this teaching job.

3. My teaching responsibilities require me to lecture, conduct discussions, and comment on audio-visual

materials to the class members. The course involves multiple presentations, but is not part of a program of education or training sponsored or funded by any government, nor is it part of the regularly established curriculum of an institution of higher education.

4. I have been informed by the General Legal Services office of the IRS (letter attached to this affidavit) that Becker CPA course does not fall within one of the exceptions to the Ethics Reform Act ban on acceptance of honoraria for speaking. The IRS has withdrawn its approval to engage in this outside employment, although my manager indicated that he continued to believe my teaching enhanced the image and effectiveness of the IRS and was beneficial to me in improving my professional expertise (copy attached). Although the withdrawal of approval indicates to me that I cannot engage in the activity at all, I am going to argue to IRS that I should at least be permitted to teach the course for free.

5. I am in a very difficult position right now because I must continue teaching or I will soon be replaced by the Becker organization. In the short term, because I expect the ban on "honoraria" to be declared unconstitutional or eliminated by Congress, I would be willing to continue teaching without accepting my paycheck, in order to preserve my position with Becker. I am currently exploring with IRS and OGE whether I can defer acceptance of compensation or place my compensation in an escrow account.

6. I wish to continue my employment. I welcome the income, and I enjoy the intellectual exercise of teaching the course. As IRS has acknowledged, the teaching keeps me abreast of accounting procedures. I would not have agreed to teach the course for free, and I will not continue teaching the course beyond the short-term immediate future without receiving compensation, because I view my work as a business arrangement with a profit-making

enterprise. If I could not receive compensation for this work, I would seek other outside employment for which I could lawfully accept compensation.

I declare under penalty of perjury that this statement is true and correct to the best of my knowledge and belief.

Date: June 11, 1991

/s/ Lawrence W. Ford
LAWRENCE W. FORD

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. No. 90-2922 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

AFFIDAVIT OF STEVEN SHIPPEE

1. I am a captain in the United States Marine Corps, presently assigned to the Fourth Marine Expeditionary Brigade in Norfolk, Virginia as a logistics officer.

2. During the past ten years, I have written articles in my free time for publication in the *Marine Corps Gazette* and in the Naval Institute's *Proceedings*, a professional magazine for the sea services. I published an average of two articles a year in the *Marine Corps Gazette*, somewhat fewer in *Proceedings*. The articles were on topics such as tactics and strategy, the Constitution, the War Powers Act, retirement, and other personnel matters. The articles did not directly concern my responsibilities for the United States Marine Corps.

3. Until the effective date of the ban on receipt of compensation for articles contained in the Ethics Reform Act of 1989, I received compensation for articles submitted to the aforementioned publications. I was paid from \$15 to \$25 for articles published by the *Gazette* and approximately \$20 for articles accepted for *Proceedings*.

4. In its January 1991 issue, the *Gazette* announced that, because of the Ethics Reform Act, it had adopted a policy of nonpayment with respect to those of its contributors who are military officers or civilian employees of the government (see attached copy of the relevant page). It continues to pay other contributors, including enlisted personnel, who are not covered by the ban on receipt of compensation. *Proceedings* has stated that it is paying only those who request compensation because of the Ethics Reform Act ban on receipt of "honoraria".

5. I will not write articles for publication unless I can accept compensation for my work. I have recently passed up opportunities to write, and I will not resume writing until the prohibition on receipt of compensation is struck down. I need the compensation to break even on my expenses. I find the writing to be enjoyable and worthwhile so long as I can at least defray some of my expenses; if I cannot accept the compensation, the effort is no longer worthwhile.

6. I have not explored with either magazine whether I could accept compensation to the extent of my actual expenses. I was not aware that I could accept reimbursement for my actual expenses until counsel for the National Treasury Employees Union so informed me. I have not seen any government circular or guideline memorandum informing me that I could accept such reimbursement. The only governmental guidance I have seen is a Naval Message from the Secretary of the Navy (SECNAV WASHINGTON DC//SN//121527ZDEC90), *proprio vigore* underscoring the new "prohibitions and limitations on outside earned income and employment". Accordingly, even if I could lawfully request payment from the magazines, I am and would be reluctant to do so. I find the prospect of keeping records of all my copying, research, and other expenses to be daunting, if not impos-

sible. Moreover, I am hesitant about approaching the magazines to request compensation pursuant to a "loophole." As a military officer, I decline to act in a manner that appears contrary to the law.

I declare under penalty of perjury that this statement is true and correct to the best of my knowledge and belief.

Date: July 4, 1991

/s/ Steven Leon Shippee

STEVEN LEON SHIPPEE

CE 4TH MEB Nucleus

NAB Little Creek, VA 23520

(804) 464-8708

DECLARATION OF LESLIE A. HARRIS

1. I am Chief Legislative Counsel of the Washington Office of the American Civil Liberties Union. I make this declaration to inform the Court about recent developments in Congress on legislation that would amend the provision of the Ethics in Government Act of 1978 restricting the receipt of honoraria by federal government employees.

2. On November 27, 1991 Congress officially adjourned the first session of the 102d Congress. Congress will not begin the second session until January 3, 1992, but adjourns that same day and reconvenes on January 21, 1992.

3. Despite the best efforts of the American Civil Liberties Union, Common Cause, the National Treasury Employees Union and the Office of Government Ethics, among others, Congress adjourned without passing any legislation that would amend the provision of the Ethics in Government Act of 1978 that the plaintiffs in these consolidated cases challenge.

4. On November 25, 1991, the House of Representatives passed the Frank-Gekas compromise amendment, H.R. 3341. The Frank-Gekas amendment was supported by the ACLU, Common Cause, and the Office of Government Ethics.

5. The Senate has not agreed to the provisions of H.R. 3341. The primary opponent to the provisions of that bill has been Senator Byrd (D-W.Va.), who I have been informed objects to any provision that would allow legislative branch employees to receive honoraria for articles, speeches, and appearances. Because of Senate rules all that is needed to prevent a bill from reaching the Senate floor is the objection of one Senator. I have been told that Senator Byrd informed Senate Majority Leader Mitchell that he would object to the introduction to the floor of the provisions of H.R. 3341.

6. If the Senate should adopt a bill that comports with Senator Byrd's objection, the legislation would in my opinion still fail because the House would then have to vote on the new version of the bill and Representative Brooks (D-Tex.), Chairman of the House Judiciary Committee, is opposed to legislation that draws any distinction between executive branch and legislative branch employees.

7. The opposing positions held by Senator Byrd and Representative Brooks make it highly unlikely that Congress will adopt this legislation in an expedited fashion when it reconvenes in 1992. It is my opinion that legislation to amend the honoraria restriction will not even be considered by Congress until February of 1992 at the earliest and will not be enacted for some time after that, if at all.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 2, 1991.

/s/ Leslie A. Harris

LESLIE A. HARRIS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 90-2922 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

SECOND SUPPLEMENTARY AFFIDAVIT OF
JAN ADAMS GRANT

1. I am an individual plaintiff in this litigation and have filed affidavits dated December 3, 1990, and July 10, 1991, in this matter. I am an Internal Revenue Service employee; before the effective date of the Ethics Reform Act of 1989, I was also a part-time speaker and writer of articles and books on environmental subjects.

2. Since January 1, 1991, when the ban on my receipt of compensation for my article writing and public speaking became effective, I have given no speeches and have written no articles for publication.

3. Because of the ban on receipt of "honoraria," I am not even being invited to deliver speeches without compensation. I was told by a representative of one organization that she had not invited me to make a speech on earthquake preparedness because she believed the law prohibited me from speaking in public, even without compensation. Her misunderstanding is commonplace, I have discovered; most people who have heard of the ban

assume that I am barred from engaging in the activity on any basis.

4. I understand that the U.S. Court of Appeals for the District of Columbia Circuit has suggested that my publishers could place my compensation in escrow, pending the outcome of the litigation. I approached one magazine editor with that idea and was greeted with laughter. The individual in question was the editor-in-chief of *Audubon*, a magazine for which I have written in the past. I asked the editor if he would agree to place my compensation in escrow. His comment was that federal workers were "a pain in the ass" and that he would deal instead with writers who would not cause him aggravation. He explained to me that he could not be bothered to deal with such an arrangement, for he had more than enough manuscripts from writers who would cause him no extra trouble. I viewed his laughing response to my question to be both humiliating and patronizing.

5. I would like to point out that publishers have not, in the past, been aware that I am a federal employee. The ironic effect of this law and the proposed escrow arrangement has been to force me to reveal that I am a federal employee; furthermore, because the publisher inevitably asks the follow-up question, I have been forced to disclose that I am an employee of the Internal Revenue Service. I find it puzzling that the practice of receiving honoraria could be viewed as creating the appearance of a conflict of interest when the individuals from whom I receive payments are not even aware that I am a federal employee. It is even stranger that my affiliation becomes known only when I ask, as directed by the Court of Appeals, that my payment be put in escrow pending my challenge to this law.

6. I estimate that it will take a full year, from the time the law is amended or struck down, before I will be able to

resume my article writing. It will take me many months to discover what subjects are topical and marketable and to do the research. I then estimate it will take six to eight months to write my query letters to publishers and to obtain a favorable response. I calculate that I would not be able to publish an article until 1993 if the ban were lifted now.

The longer the lapse of time before I can resume my article writing, the more difficult it becomes. My portfolio is becoming increasingly dated and my contacts in the business are fading. Editors and publishers look askance on writers whose last published articles are in 1990.

I declare under penalty of perjury that this statement is true and correct to the best of my knowledge and belief.

Date: 11-23-91

/s/ Jan Adams Grant

JAN ADAMS GRANT

**SUPPLEMENTAL DECLARATION
OF DR. GEORGE J. JACKSON**

1. I make this supplemental declaration to inform this Court of likely adverse consequences I could suffer if the honorarium statute is still in effect at the end of this year. (See Exhibit A for previous declaration).

2. Since January 24, 1991, when I was informed by the *Washington Post* that I could write for them without getting paid, I have continued doing so. The *Post* agreed to this arrangement with the expectation that the honorarium statute would soon be either amended or declared unconstitutional. (See Exhibit B). Pursuant to the approach endorsed by the Court of Appeals, the *Post* apparently has retained in escrow the money that otherwise would have been paid to me for the articles I have written. As of today, this amounts to \$1,865.

3. Allan M. Kriegsman, Chief Dance Critic of the *Post* recently communicated to me that at the end of this year, the *Post* will pay me everything that I would be entitled to were it not for the honorarium statute. It is my understanding that the *Post* will not continue to have an escrow account for me after the end of this year. Since the *Post* will give me the money whether I want to receive it or not, it is my understanding that even if I were to immediately deposit it into another escrow account, the IRS would consider it to be income received and I would have to pay taxes on it. More important, the Office of Government Ethics, according to its memorandum of June 24, 1991, would consider this to be money received, which would place me in violation of the honorarium statute. (See Exhibit C).

4. I am not sure of what can I do to avoid violating the honorarium statute, other than not cashing the check, which in any event might still place me in violation of

the statute. I also am unsure of what to do to avoid incurring tax liabilities even if I cannot enjoy the income received.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 26, 1991

/s/ George John Jackson
DR. GEORGE J. JACKSON

EXHIBIT B

The Washington Post

202-334-7564

Feb. 8, 1991

TO WHOM IT MAY CONCERN:

For many years, Dr. George Jackson has regularly contributed to the dance coverage of The Washington Post, on assignment from myself and editors of the Style section. We consider Dr. Jackson's contributions invaluable.

Until the start of the current year (1991), he was, of course, compensated by the Post for this work. Since Jan. 1, however, he has not been receiving any payment, in accord with the recent legislation concerning "honoraria" for federal employees. He will continue to work for us, and will not be reimbursed for now, though it is our hope that pending legislative initiatives, and/or litigation, will restore unambiguous legality to the compensation he richly deserves.

Very truly yours,

/s/ Alan M. Kriegsman

ALAN M. KRIEGSMAN
Dance Critic

Exhibit C

[SEAL]

United States Office of Government Ethics
Suite 500, 1201 New York Avenue, N.W.
Washington, D.C. 20005-3919

June 24, 1991

**MEMORANDUM FOR DESIGNATED AGENCY
ETHICS OFFICIALS, GENERAL COUNSELS AND
INSPECTORS GENERAL**

FROM: STEPHEN D. POTTS
DIRECTOR

SUBJECT: Placing Honoraria into Escrow Accounts

The Office of Government Ethics has received a number of inquiries regarding the legality of employees arranging to have honoraria placed in escrow pending the outcome of litigation contesting the constitutionality of the honorarium prohibition added by Title VI of the Ethics Reform Act of 1989. The three cases pending in the District Court for the District of Columbia have been consolidated and set for hearing on July 16, 1991.

Inquiries regarding the possible use of an escrow arrangement were prompted by the following language contained in the decision by the Court of Appeals for the District of Columbia Circuit denying plaintiffs' request for a preliminary injunction:

... The appellants can put their compensation into escrow during the pendency of this litigation. If they succeed on their constitutional challenges, they can recover any honoraria paid into those accounts. Cf. *Hudson v. Chicago Teachers United, Local 1*, 708 F.

Supp. 961, 963 (N.D. Ill. 1989) (holding that defendant's proposed escrow arrangement would 'adequately protect plaintiffs from the sort of irreparable harm that plaintiffs seek to avert'). If the Appellants fail, then they were never entitled to compensation in the first place.

National Treasury Employees Union v. United States, Nos. 90-5406 *et al.* (March 15, 1991).

Regulations implementing the statutory prohibition are contained in 5 CFR Part 2636 (56 FR 1721-1730, Jan. 17, 1991). Section 2636.203(e) provides that, unless it is paid to a charitable organization, an honorarium is "received" by an employee if it "is paid to another person on the basis of designation, recommendation or other specification by the employee."

It is our opinion that it would not violate the statute or the regulations for an employee to ask a person who has agreed to pay him an honorarium to establish an escrow account with provision for payment of the honorarium to the employee in the event of a final, nonappealable decision by a Federal court holding that the underlying statute is unconstitutional or in the event of legislation retroactively amending the statute to permit receipt of the escrowed honorarium. Where the payor rather than the employee places the honorarium into escrow with an agent selected by the payor, we would not view the escrowed honorarium as having been "received" by the employee until the conditions of the escrow are met and the honorarium is actually paid to the employee. Further, an agreement with the payor to pay an honorarium to the employee upon condition either that the court renders a final, nonappealable decision that the statute is unconstitutional or that the law is retroactively amended would not, in our opinion, violate the statute or regulations.

SUPPLEMENTAL DECLARATION OF ROBERT A. GORDON

1. I make this supplemental declaration to inform this Court of likely adverse consequences I could suffer if the honorarium statute is still in effect at the end of this year. (See Exhibit A for previous declaration).

2. As indicted in my declaration of April 11, 1991, in a good faith reliance on the opinion of the Court of Appeals, I opened an escrow account and deposited a check for \$200 which I had received as an honorarium from the Maryland Institute of Art.

3. I have recently repeated my lecture entitled "The Glory and The Shame" and also have given a lecture on Black music. Both of these lectures were at the Maryland Institute of Art. I will soon receive payment of \$100 for each of these lectures, and I intend to deposit it in the escrow account I opened last April.

4. My main concern at this point is that I am not sure if I have to claim what I have in the escrow account as income in my income tax return. If I do have to claim it as income, it seems unfair to me given that I have not been able to enjoy this income. Furthermore, if I do claim it as income and the law is never amended or invalidated, I am paying taxes on money to which I was never entitled.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 26, 1991

/s/ Robert A. Gordon

ROBERT A. GORDON

SUPPLEMENTARY DECLARATION OF PETER G. CRANE

1. I submit this declaration in support of the Plaintiffs' Opposition to Defendants' Motion to Alter or Amend the Memorandum and Order of March 19, 1992. I have previously submitted a declaration in this case, dated April 11, 1991, which is attached at pages 15-20 of the Appendix (Volume I) to the Plaintiffs' Joint Motion for Summary Judgment.

2. When this lawsuit was filed in December 1990, and when the plaintiffs moved for summary judgment in April 1991, I was a lawyer employed by the Nuclear Regulatory Commission, Office of the General Counsel. My government grade level was GS-16.

3. On July 26, 1991, I resigned from my job with the NRC to accept a three-year appointment as a judge of the Nuclear Claims Tribunal in the Republic of the Marshall Islands. (Because I was to be employed by another government, I was required to resign from the NRC rather than take a leave of absence.) I assumed my judicial duties on August 23, 1991.

4. As explained in detail in my previous declaration (see ¶¶ 9-10), early last year I was investigated by my agency for allegedly violating the Ethics Reform Act of 1989. The investigation was prompted by an article I had written in late December of 1990 describing the various pernicious effects of the honoraria prohibition, which was published in the Op-Ed section of the *Washington Post* on January 6, 1991. On February 5, 1991, I received a check from the *Post* for \$150, which I signed over to a charity. My agency then informed me that they believed I had violated the law and that the matter would be referred to the Justice Department and my supervisors for possible further action.

5. At the time I left the Washington, D.C. area to

assume my duties in the Marshall Islands, I had not heard from the Justice Department or my supervisors about any further action on my case. It was my understanding at that time that the Department of Justice was deferring action on my case while waiting to see whether Congress amended the law. Thus, notwithstanding that I had terminated my employment with the federal government, I had every reason to believe that I was still at risk of having proceedings instituted against me at any time, the result of which could be a civil penalty of \$10,000.

6. For personal reasons, my family and I recently returned to the Washington, D.C. area from the Marshall Islands. Effective April 27, 1992, I will resume my employment as a lawyer with the NRC's Office of the General Counsel. As before, my government grade level will be GS-16.

7. To this day, I have not heard further from the Justice Department or my supervisors about any further legal action against me for my alleged violation of the honoraria prohibition.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 5, 1992.

/s/ Peter G. Crane
PETER G. CRANE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-2922 (TPJ)

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

Civil Action No. 90-3027 (TPJ)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA, ET AL.,
DEFENDANTS.

Civil Action No. 90-3044 (TPJ)

PETER G. CRANE, ET AL.,
PLAINTIFFS,

v.

UNITED STATES OF AMERICA,
DEFENDANTS.

ORDER

Upon consideration of the several plaintiffs' motions to alter or amend the Memorandum and Order of March 19, 1992, and the opposition thereto, and upon consideration of the defendants' motion to alter or amend the same, it is, this 17th day of April, 1992,

ORDERED, that the plaintiffs' several motions are denied; and it is

FURTHER ORDERED, that the defendants' motion is denied.

/s/ Thomas Penfield Jackson

THOMAS PENFIELD JACKSON
U.S. District Judge

[SEAL]

Internal Revenue Service

RULES OF CONDUCT

These Rules Supplement
the American Standards of Conduct
Department of the Treasury

A SUPERVISOR'S GUIDE
TO THE
RULES OF CONDUCT

The Guidance/Interpretation sections of this Guide are
for Official Use Only.

Rule 224**Prohibited Activities****Rule 224.1****Service Rule**

Employees may not engage in any outside employment or business activity which gives rise to a real or apparent conflict of interest. Such incompatible activities include:

- (a) **Legal Employment or Practice**—Legal activities involving Federal, State, or local tax matters, or any matter in which the United States is a party.
- (b) **Appearance On Behalf of Taxpayers**—Appearing on behalf of any taxpayer as an attorney, agent, or representative before any government agency, Federal, State, or local—in an action involving a tax matter except upon written authorization of the Commissioner of the Internal Revenue Service.
- (c) **Accounting**—Engaging in accounting, the use, analysis, and interpretation of financial records when such activity involves tax matters.
- (d) **Bookkeeping**—Engaging in bookkeeping, the recording of transactions, record making phase of accounting, when such activity is directly related to a tax determination.
- (e) **Preparation of Tax returns for Compensation**—Engaging in the preparation of tax returns for compensation, gift, or favor.

Guidance/Interpretation**Official Use Only**

The five (5) activities listed in this section all directly relate to the mission of the Service. Therefore, it is the Service's position that employees will not be permitted to engage

in them. These prohibitions are necessary to maintain public confidence in the integrity of the Service and its employees, and also to prevent allegations of conflict of interest and/or the abuse of official position. They address concerns peculiar to the IRS and are justified because of the Service's need for a positive public image. Numerous court decisions have acknowledged that the nature of the IRS mission is such that its employees can be held to strict accountability for their off duty activities. Any real or apparent involvement in activities that appears to compromise the integrity of Service employees could lead to serious consequences and a breakdown in the tax collection system.

Generally, permission to engage in any of the five (5) outside employment or business activities listed in this section will be denied. These prohibited activities are so clearly related to the mission of the Service that approval of such activities would normally not be in the best interest of the IRS.

Certain exceptions to the prohibitions in this section may be made based upon mitigating circumstances. The authority to permit exceptions to Section 224 is governed by Delegation Order No. 105, as revised. An example of a mitigating circumstance in which an exception might be allowed is a revenue officer who requests to represent his or her widowed mother in an audit. The employee previously prepared the mother's tax return without compensation. In this situation, as provided in Section 224.1(b), the employee must request from the Commissioner of the Internal Revenue Service written authorization to engage in this type of activity. If an employee makes such a request, it is imperative that: 1) the employee be instructed that the Commissioner is the only authorized approving official for these matters; and 2) the employee must fully set out the facts and circumstances necessary for the review of the request.

Overall, few exceptions to these provisions should be granted.

Rule 225

Restricted Activities

Rule 225.1

Service Rule

Employees must, prior to engaging in any outside employment or business activity, *either* with or without compensation, request and obtain written permission from the appropriate official. Subject to Section 224 such activities may be approved unless the activity would result in an actual or apparent conflict of interest. The following activities listed under Section 225:2 represent examples of areas of outside employment or business activity where an accrual or apparent conflict of interest will most likely occur. As such, particular attention should be paid to this guidance by employees in seeking approval.

Guidance/Interpretation

Official Use Only

Generally, any outside employment or business activity may be approved unless it will result in an actual or apparent conflict of interest. However, this section has been modified by a Memorandum of Agreement concerning the Rules of Conduct as Affects Outside Employment, dated May 1, 1986, (see Appendix 11) which states as follows:

"With the exception of those activities listed under Section 224, Prohibited Activities, employees may engage in outside employment so long as they comply with any applicable procedural rule regarding requesting approval of outside employment and such outside employment will not:

- A) result in a conflict of interest or the appearance of a conflict of interest with his/her official duties and responsibilities; or
- B) bring discredit upon or lower public confidence in the Internal Revenue Service; or
- C) interfere with his/her efficient performance of his/her duties or his/her availability for duty."

The above standard represents the agreement with NTEU on Rules of Conduct as Affects Outside Employment and pertains only to bargaining unit employees. However, the Service has unilaterally decided to extend this standard to all outside employment or business activity requests of all Service employees.

The above standard is the exclusive measure to be used by a third party, e.g., an arbitrator, to determine whether management, in denying an outside employment/business activity request, acted appropriately. Therefore, in order that the Service maintain a consistent approach to outside employment/business activity, use of this standard in the review of all requests for such activity is recommended.

An activity not specifically prohibited in Section 224 will be evaluated on an individual basis using only the criteria in the above standard as the basis for approval or denial. For example, a supervisor should not routinely deny requests from professional employees to perform such part-time work as manual labor, driving a truck, janitorial maintenance, or gardening, even though he or she feels that those types of work are not appropriate for professional employees. These occupations, per se, are not in conflict with the standard. Supervisors may not impose additional standards.

There are situations where application of the standard may result in the denial of a request for outside employment. Examples are as follows:

- 1) A situation which may result in a conflict of interest or the appearance of a conflict of interest with an employee's official duties and responsibilities would be one in which a revenue officer in a small post of duty requests permission to work as a bill collector in the city's only collection agency.
- 2) A situation which may bring discredit upon or lower public confidence in the Internal Revenue Service is one in which a special agent requests permission to buy an interest in and manage a small hotel which is known in the community to be frequented by racketeers and others of ill-repute.
- 3) A situation which may interfere with an employee's efficient performance of duties or availability for duty would be one in which a Service Center data transcriber requests outside employment as a sales clerk in an all night drug store from 9:00 p.m. to 3:00 a.m. Monday through Friday. Such work hours would in all likelihood affect the employee's capacity to timely report for work and his or her ability to perform on an acceptable level.

References

Appendix 11, Memorandum of Agreement Concerning The Rules of Conduct As Affects Outside Employment; History and Interpretation of the Memorandum of Agreement.

Rule 225.2

Miscellaneous Outside Activities

Guidance/Interpretation

Official Use Only

Certain restricted activities are separately itemized in this section. This is done because the nature of these activities

is such that there is a strong likelihood that they may result in a real or apparent conflict of interest. As such, specific guidance is provided to employees seeking approval. These activities may be approved provided supervisors are assured that granting the approval will not lead to conflict of interest situations.

For example, because of the mission of the Service, there would generally be more potential for real or apparent conflict of interest if a tax auditor were to keep the books for several small specialty stores than if the same tax auditor were to be a part-time typist for a company specializing in typing term papers for college students. In the first instance, there is a greater possibility of conflict because bookkeeping can involve tax consequences. Therefore, specific guidelines are offered in Section 225.2(3) to assist supervisors in making their recommendations for approval.

It must be remembered that the only standard against which *all* outside employment/business activity requests will be judged (exclusively of those activities prohibited under Section 224) is that an employee may engage in any outside employment or business activity as long as he or she complies with the applicable procedural rules (Section 226) regarding requesting approval and such outside employment will not: a) result in a conflict of interest or the appearance of conflict of interest with his or her official duties and responsibilities; or b) bring discredit upon or lower public confidence in the Internal Revenue Service; or c) interfere with his or her efficient performance of duties or availability for duty.

Rule 225.2(1)

Speeches and Publications

- (a) Public addresses and articles for publication, whether performed as an official duty or in a private

capacity, which deal with official operations or policies of the Service or the Department of the Treasury, must be cleared, in advance, in accordance with current Service directives. (See IRM 1(19)40.) Specific written permission in advance is necessary if the author is to be identified as a Service employee.

- (b) Where any such activity is performed as an official duty, employees may not accept a fee, salary, honorarium, or other compensation from any source other than the Federal Government. Acceptance of reimbursement for travel, lodging, meals, or nominal courtesies is governed by Section 234.1.
- (c) Where any such activity is performed in a private capacity, employees may accept a fee, salary, or other compensation which is reasonable and in accordance with these rules.

Guidance/Interpretation

Official Use Only

This section sets out the policy of the IRS concerning employee involvement in speaking or writing about Internal Revenue Service matters. Such activities include public addresses or published writings which deal with the operations or policies of the IRS or the Department of the Treasury. The IRS encourages its employees to participate in such activities; however, employees are subject to certain limitations and restrictions. One major limitation on these activities is that an employee must obtain prior clearance from the appropriate official before making such a speech or submitting an article. This applies whether the activity is done as an official duty or in a private capacity. Another major limitation is that if an employee performs the activity in an official capacity, he or she may not accept any fee, salary, honorarium, or other compensation for the speech or publication.

Criminal penalties are provided for government employees who receive compensation from a private source for their services to the government.

However, if, as an official duty, an employee participates in a tax forum or continuing educational program, he or she may accept payment or reimbursement of reasonable expenses for travel, lodging, and meals from state or local governments, or from organizations with IRC 501(c)(3) tax exempt status. (See also, Section 234, Gifts and Gratuities.)

References

26 USC 501 (c)(3), 18 USC 209; 5 CFR 735.203(b),(c), 31 CFR 0.735-39; IRM 1(19)40

FAIRNESS FOR OUR PUBLIC SERVANTS

The Report of
The 1989 Commission on Executive,
Legislative and Judicial Salaries

December 15, 1988

COMMISSION ON EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES

December 15, 1988

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

On behalf of the fiscal 1989 Quadrennial Commission on Executive, Legislative and Judicial Salaries, I enclose herewith the Commission's report to you.

The Commission's principal function is to recommend appropriate salary levels for the top positions in the three branches of our government so that you may perform your statutory duty of making your own recommendations to the Congress as part of your proposed budget for fiscal 1990. Under the Quadrennial Commission statute, as amended in 1985, your recommendations take effect automatically unless and to the extent that within 30 days of your submission Congress agrees on a joint resolution disapproving part or all of such recommendations.

The Commission has concluded that the best way to measure the adequacy of present salary levels is to compare them with the salary levels which the President recommended to Congress in 1969, based on the report of the first Quadrennial Commission, and which Congress allowed to go into effect. We have found that present salary levels, stated in constant dollars, are approximately 35% less than the salary levels fixed for the same positions in 1969. Thus, our top federal officials have seen their salaries severely eroded by inflation while the compensation of all workers in the private sector has slightly improved over inflation during the same 29-year period.

As a result, many of our top Executive branch officials, members of Congress and federal judges find that they cannot remain in public office without imposing severe hardships on their families. One of our most distinguished judges, who was appointed before 1969, expressed concern that if he remained on the bench he would be unable to provide for his children the same educational opportunities that had enabled him to become a federal judge.

We have found that as a result of this salary erosion, the average period of service for top Executive branch officials has declined to 18 months. Many members of Congress are declining to stand for another term even though the reelection success rate of incumbents is better than 90%. More federal judges are resigning from the bench and returning to law practice than ever before.

We have also found that because their salaries are so inadequate, many members of Congress are supplementing their official compensation by accepting substantial amounts of "honoraria" for meeting with interest groups which desire to influence their votes. Albeit to a less troubling extent, the practice of accepting honoraria also extends to top officials of the Executive and Judicial branches.

Finally, we have also found that the inadequacy of present federal salaries severely limits the ability of all three branches to attract the most highly qualified individuals to enter the public service. The top AIDS researcher at NIH testified that because of present salary limitations, NIH has been unable for the last ten years to attract *any* qualified scientist to fill its most important senior research positions. Retired Chief Warren Burger informed us that he knew of one Court of Appeals vacancy that was turned down by ten qualified lawyers before anyone could be found to fill it.

Accordingly, the Commission unanimously recommends that salary levels for top federal officials be set at approximately the same amount in constant dollars as the salary established for the same positions in 1969, with appropriate adjustments to maintain current relationships among the various positions. We further recommend that Congress enact legislation abolishing the practice of accepting honoraria in all three branches. We are advised by the Office of Management and Budget that these salary increases will be offset by other savings in personnel costs.

We appreciate the opportunity of serving on the Commission. We believe the time has come to pay fair salaries to our highest federal officials, and that fairness to them is in the national interest of us all.

Sincerely,

/s/Lloyd N. Cutler

LLOYD N. CUTLER
Chairman

REPORT OF THE 1989 QUADRENNIAL COMMISSION

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PREFACE

"A public office is a public trust."

Senator Charles Sumner, 1872

The public interest is best served when public offices are filled by the most capable and conscientious citizens willing to assume the burden. No qualified citizen should be deterred from serving in public office by adequate levels of compensation. While public salaries need not match private salaries dollar for dollar, they should not be so low that public servants are asked to forego major educational and quality of life opportunities for their families that would be available to the same highly qualified individuals in private life.

Public service carries with it many well-known and broadly accepted burdens: invasion of individual and family privacy; meticulous reporting of all financial holdings and activities; adherence to a strict code of ethical behavior while in office; restrictions on personal conduct after returning to private life; the risk of unfair accusation of having violated any of the foregoing; and the daily weight of responsibility for decisions that affect millions of other citizens. But at present the heaviest burden of all is the huge disparity between federal pay and the pay for private sector positions requiring comparable skills.

Most who seek or accept high public office do so despite rather than because of the salaries these positions pay. Much more important motivations are the pride, prestige, and privilege of service, and the opportunity to contribute to the greater public good.

The initial decision to serve, however, comes more easily than remaining in service for an extended period. Levels of compensation in the private sector have more than kept

pace with inflation over the past twenty years. But the levels of salaries of high federal officials are now only about 65-70% in constant dollars of what their 1969 salaries were for the same positions. Federal judges are resigning their lifetime appointments at a higher rate than ever before. The average tenure of the most senior Executive branch officials is approximately 18 months. A growing number of incumbent Members of Congress do not stand for reelection even though the reelection success rate of incumbents is now over 90%. This growing trend toward early departure from public life shows that however strong the desire to serve may be, the financial penalties of remaining in public service are causing some of our most able officials to return to private life because the disparity in financial rewards becomes just too much.

As part of its deliberations, the Commission held two days of public hearings. Our witnesses included many of the nation's leaders in both the public and private sectors. Almost all expressed deep concern over the inadequate levels of compensation for top federal officials, and the signals these relatively low salary levels send to all citizens — and especially to incumbents and prospective appointees — as to how cheaply and lightly we value the work our highest public servants perform. The detrimental impact of inadequate compensation on the ability of these officials to provide for their families was especially noted as a cause of major anxiety.

While witnesses before the Commission agreed that no one serving in government should expect to be paid as much as for a comparable position in the private sector, they also agreed that when the differential exceeds 50%, as it does by a wide margin today, corrective steps are required.

Mr. James C. Miller III, until recently Director of the Office of Management and Budget, advised the Commission that the increases necessary to restore equity in salaries for top level Executive branch official could and

would be offset by overall reductions in other budgeted personnel costs *so as to have no effect on the level of Executive branch expenditures in the budget*. The testimony of the legislative witnesses persuades the Commission that a similar offset could be achieved in the Legislative branch.

Several witnesses also pointed out that because of their inadequate salaries, many Members of Congress have resorted to supplementing their income by accepting honoraria of up to \$2,000 per occasion for making a speech or even attending a Washington meeting or other event. Currently, Representatives may receive outside earned income, including honoraria up to 30% [\$26,850] of annual salary, while Senators may receive honoraria up to 40% [\$35,800] of annual salary with no percentage limit on other forms of outside earned income.

The testimony indicated that the average annual level of honoraria income exceeds 20% of salary, with many Members receiving and retaining much larger amounts, and that in many cases, the payments come from interest groups with highly specific legislative axes to grind. Much of this testimony was given by leading and former Members of Congress. They agreed with other concerned witnesses that in order to maintain public confidence in the integrity of Congress, Congressional salaries should be raised to adequate levels, and that at the same time, honoraria should be abolished.

SUMMARY OF MAJOR RECOMMENDATIONS

For the reasons stated in the previous section, the 1989 Commission Executive, Legislative and Judicial Salaries unanimously makes the following recommendations:

Recommendation #1: As part of this fiscal year 1990 budget submission, the President should recommend salary levels for senior members of the Executive, Legislative and Judicial branches which approximate in constant dollars the salaries set for these positions twenty years ago, with appropriate adjustments to maintain existing relative differentials between the various pay levels. The suggested recommendations for each position are shown in Table 1.

Recommendation #2: Congress should enact legislation to increase the President's salary, which has been fixed at \$200,000 since 1969, to \$350,000, adjusted for inflation for the calendar years 1989-1992. As Constitutionally required, this increase would not take effect until January 20, 1993.

Recommendation #3: Congress should enact legislation and each House should modify its Ethics Code to abolish honoraria (or payments that are the substantial equivalent of honoraria) as a permissible source of outside earned income for all three branches, effective when the recommended pay increases begin.

Recommendation #4: Congress should enact legislation and each House should modify its Ethics Code to specify, in addition to existing restrictions, that no official of the Executive, Legislative or Judicial branches may receive outside earned income for activities or services that conflict or appear to conflict with the performance of official duties.

Recommendation #5: Congress should enact legislation correcting current inequities in levels of compensation between positions. Such legislation should include the following:

- Raising the position of Chairman of the Federal Reserve Board from Level II to Level I of the Executive Schedule;
- In those Departments without Deputy Secretary positions (Health and Human Services, Education, Interior, Housing and Urban Development), raising the level of the second highest position to Level II;
- Raising the positions of the Commissioner of the Social Security Administration, the Assistant Secretary for Health, and the Administrator of the Health Care Financing Administration from Level IV to Level III;
- Raising the maximum salary level for Administrative Law Judges and judges who serve on Boards of Contract Appeals to that of members of the Senior Executive Service. Additionally, the Office of Personnel Management should conduct a comprehensive review of the General Schedule pay system for supergrades (GS-16—GS-18) in relation to the pay levels of the Senior Executive Service, and report back to the Congressional authorizing committees for legislative review.

THE LEGISLATIVE BRANCH

"I am not at all certain but that the Congress of the United States is institutionally incapable of setting its own salary. It's really not hard to understand that. It is the grand-daddy conflict of interest of all time.

"I don't think that's the system most Americans want. I think we as a nation are prepared to pay a fair price for a good and honest and capable government.

"The stumbling block in all of this is a system which ties all senior-level federal pay increases to Congressional pay raises. Members of Congress are naturally quite reluctant to raise their own pay, particularly when their salaries are so much higher than that of their average constituent.

"I proudly bear the title 'politician,' and I know how impolitic such self-generated pay raises can be, and I know why these pay raises have been habitually rescinded since at least 1816."

Howard H. Baker, Jr.,
Former Senate Majority Leader
Former White House Chief of Staff
*1989 Quadrennial Commission Hearing
November 10, 1988*

A striking parallel to Senator Baker's testimony occurred more than 170 years ago. *The Annals of Congress* report the following debate in the House of Representatives in March, 1816, between Henry Clay [Whig Party, 1815-1821] and John C. Calhoun [War Democrat, 1811-1817]:

Mr. Clay: "... The laborer is worthy of his hire; and if you do not give him the wages of honesty, it is to be apprehended the wages of corruption may, in process of time, come to be sought."

Mr. Calhoun: "What is the usual fact? Young men of genius, without property, . . . are elected; being tempted into public service by the honorable desire of acquiring distinction in the service of the country; they remain here until they have acquired some experience, and begin to be useful to the country; but are finally compelled to return to private life from the inadequacy of the pay. It is a great public misfortune; it is highly injurious to the proceedings of this House."

The Costs of Elective Office

Election to the House of Representatives or the Senate carries with it job requirements unlike any other federal office. To adequately serve a constituency, a Member must travel frequently between Washington and the district or state and maintain a residence there. Since Congress is now in session more than 200 days a year, it is usually necessary to maintain another home in the Washington, D.C. area. The reasonable and necessary business expenses of the job consume a very substantial percentage of a Member's current salary. When a Member's other family responsibilities are taken into account, most Members find it difficult to live on their current salaries. As a result, Members have resorted to the acceptance of honoraria from interest groups and other sources in order to supplement their federal compensation.

Many witnesses before this Commission have made the point that there is an inherent conflict of interest when Members of Congress are asked to vote on the level of their own salaries. A Member's personal political interest pulls him to vote against such an increase, even though the increase is clearly in the national interest. Moreover, when Members vote against increases for themselves, they usually vote against increases for the other branches as well. This is especially self-serving and contrary to the national interest because the Congress has legislated preferential rules governing the receipt of outside earned income that favor Congress over the other two branches, and allow Members of Congress to supplement their salaries through honoraria and other devices to a much greater extent than judges or officials of the Executive branch.

Honoraria and Other Forms of Outside Earned Income

"Honoraria" are payments for public appearances to deliver a talk or engage in a colloquy at the invitation of some non-governmental group, often one with a material

interest in pending or anticipated legislation. The potential for abuse or the appearance of abuse is obvious to the public, and public faith in the integrity of the Members it elects is threatened by the steady growth of this practice. Only a substantial increase in official salaries, coupled with a total prohibition on the receipt of honoraria, can correct the problem.

Over the years Congress has adopted House and Senate rules and enacted legislation governing the practice of acceptance of honoraria in all three branches. The rules are different for each branch, and even between the House and Senate. A table comparing the widely differing statutes and rules is attached as *Appendix B* to this Report.

The Commission received testimony from present and former leaders of Congress and from citizen groups that the potential for impropriety in the present rules governing honoraria was so high that the practice of receiving honoraria should be eliminated. Some members of Congress now accept an honorarium of up to \$2,000 for attending meetings with a few members of an interest group and listening to their views on a pending bill. Others receive honoraria in amounts vastly exceeding present maximum limits, give the excess to charities (as present law permits), but are entitled under tax laws and regulations to count the excess as part of their earned income for their "Keogh Plan" retirement set-asides, thus greatly increasing their annual tax deductions for such set-asides.

The only principled argument that can be made for the practice of accepting honoraria is that official salaries are far too low and must be supplemented by honoraria so that a public official can meet his minimum family obligations. If honoraria be deemed the unfortunate but inevitable consequence of inadequate official compensation, then once official compensation is made adequate, there is

no semblance of justification for the continuation of honoraria.

The Commission strongly recommends that the practice of accepting honoraria in all three branches be terminated by statute (and by appropriate changes in the House and Senate rules and in the Code of Conduct for United States Judges) at or about the time that the Commission's recommended salary increases, as they may be modified by the President, are allowed to take effect. For this purpose, honoraria should be defined so as to close present and potential loopholes such as receipt of consulting, professional or similar fees; payments for serving on boards; travel, sport, or other entertainment expenses not reasonably necessary for the appearance involved; or any other benefit that is the substantial equivalent of an honorarium. The prohibition should be extended to all Congressional and judicial staff, some of whom are not covered by the present honoraria rules.

A similar but less urgent problem exists with other forms of outside earned income apart from honoraria. As shown in *Appendix B*, present law places a 15% of salary limit on such income in the Executive branch, a 30% of salary limit in the House and no limit in the Senate or in the Judicial branch. In each branch, however, certain forms of outside earned income are totally prohibited (e.g. law practice in the Senate), although the rules differ for each branch and between the House and Senate.

The Commission recommends that along with the elimination of honoraria, Congress enact legislation and each House modify its Ethics Code to specify that, in addition to existing restrictions on particular activities and services, any activity or service engaged in by any senior official of the Executive, Legislative or Judicial branches to produce outside earned income should be prohibited if it conflicts with or appears to conflict with the performance of official duties. Conforming modifications should also be made in the Code of Conduct for United States Judges.

THE JUDICIAL BRANCH

"In the first ten years of my 17 year tenure, from '69 to '86, there were more judges who left the federal bench for economic reasons than in all the time from the beginning of the Constitution in 1789 up to 1969."

Warren E. Burger

Chief Justice of the United States, Retired

1989 Quadrennial Commission Hearing

November 10, 1988

"After 11½ years of 60-65 hour work weeks, in one of the business districts in the United States, my life had been threatened on two occasions, my 9 year old daughter's life had been threatened, my wife was still working, we had not traveled outside the country, and I was unable to foresee how I could afford to send my youngest daughter to the university of our choice, I came to believe that my employer had not treated me fairly in an economic sense.

"The decision to leave the bench was agonizing. However, for years I had been intrigued with the challenge of practicing with talented lawyers in a large, prestigious and active law firm. I took advantage of an excellent opportunity to pursue such a challenge. It is clear in my mind that the quantum increase in compensation was a strong inducement for me to leave the bench. In 1985, at age 57, I had limited productive years ahead, and I also knew that if I entered private practice I could afford to educate our youngest daughter, repair our house, my wife could retire and, finally, my earnings are somewhat comparable to the income earned by a number of law school classmates and many of the lawyers I have trained.

"On the other hand, being a United States District Judge, in my view, is being at the tip-top of the legal profession. I miss the honor and privilege of doing my best to provide extremely valuable public service to our country. I miss the Court."

Judge Robert M. Duncan
Former United States District Judge
Southern District of Ohio,
Eastern Division, 1974 to 1985
1989 Quadrennial Commission Hearing
November 11, 1988

"I don't feel badly when judges get second hand cars and keep them for ten years. They can live with that. I don't feel badly when judges have suits which are almost threadbare. They can live with that. And I don't feel badly if judges cannot afford country clubs. Society can survive with that. But for all of us as judges, we know that the passport of opportunity for us was education; the ability to attend the best universities in this person and then go out and make a contribution to hopefully improve the quality of life. And judges today are confronted with the real problem as to whether they can provide for their children the type of educational opportunities which they had."

Judge A. Leon Higginbotham, Jr.
United States Circuit Judge
United States Court of Appeals
for the Third Circuit
1989 Quadrennial Commission Hearing
November 11, 1988

It is often claimed that while judicial pay levels are adequate in major metropolitan areas, they are more than adequate in other parts of the country. However, the Commission received an unsolicited letter from a judge in Macon, Georgia, who had practiced law in a farming community of 6,000 and said that even in rural Georgia he could make more money in private practice than his judicial salary. His letter continued:

"I love the job and would sell off assets, if necessary, to meet my living expenses, the biggest of which is the education of my children. If I didn't have some farm and timberland that my father left me, I doubt if I would be so sure that I will spend the rest of my career on the bench."

Judge Duross Fitzpatrick
U.S. District Court Judge
Middle District of Georgia
Letter to the Commission
November 1, 1988

Inadequacy of Current Judicial Compensation

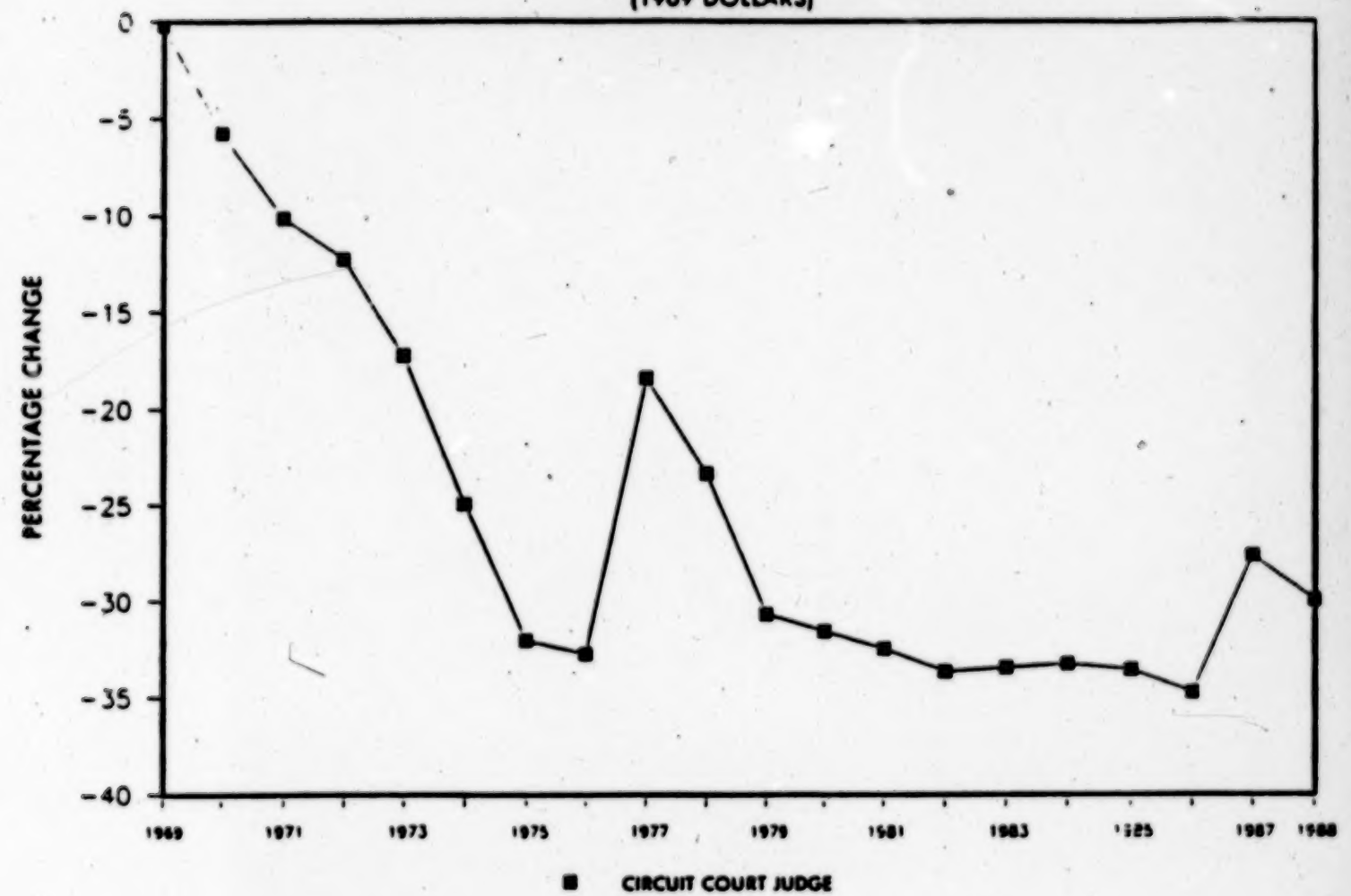
Service in the federal judiciary has long been regarded as the pinnacle of success and prestige in the legal profession, attracting attorneys of the highest caliber and widest experience. As previous Commissions have noted, the loss in real purchasing power of judicial salaries over the past 20 years *is threatening to diminish the quality of justice in this country by dissuading the best and the brightest in all sectors of our society from service on the federal bench.*

The Constitution provides that federal judges shall be appointed to serve "during good Behaviour" (i.e., for life), and that their compensation shall not be diminished during their time of service. The concept of lifetime service

with undiminished compensation was designed to protect the independence of judges by removing any concern that the President or Congress would curtail their time in office or reduce their salaries. Partly because of this concept and partly because our judges are now drawn from all social classes, the American public places more trust in our diversified and independent judiciary to define and uphold its rights than do the citizens of other democracies.

However, as the following chart shows, salary increases have not kept pace with the cost of living. The constant dollar value of federal judges' salaries has been eroded to less than 70% of what it was in 1969 [*Chart 7*]. At the same time, the workload of judges has increased dramatically. Despite several increases in the number of authorized judgeships in the last twenty years, caseloads per judge have increased sharply. Since 1969, average District Court caseloads have increased 53%, from 339 to 520 cases per judge per year. The appellate courts have experienced more than a 100% increase, with average caseloads rising from 123 cases per judge in 1969 to 249 in 1988. This combination of less pay for more work has caused many judges to leave the bench for private practice at much higher levels of compensation.

Chart 7
CIRCUIT COURT JUDGES PURCHASING POWER
(1969 DOLLARS)



Source: Office of Personnel Management.

Both the American Bar Foundation and the Judicial Conference Committee on the Judicial Branch conducted surveys of federal judges to learn the attitudes and future plans of federal judges if present salaries are not significantly increased.

According to the American Bar Foundation survey, "The Effect of Compensation on the Career Satisfaction Experienced by Federal Judges":

- Ninety-five percent of the responding active judges feel their compensation is inappropriate for the nature of the work they undertake and the level of professional achievement they have reached.
- In the absence of a significant increase in compensation 30 percent of the responding active judges plan to leave the federal bench before retirement; 30 percent of those who plan to leave early will do so in the next 5 years;
- Ninety-two percent of the respondents who indicated that they will curtail their tenure state that the low salary level is an important factor in their decisions.
- Judges appointed since 1980, with only 5 to 8 years experience on the bench, are more likely than those with longer judicial experience levels to resign their seats and return to private life.

The increasing number of resignations validate these statistics. In the 15 years from 1958 to 1973 there were only 6 resignations from the federal bench. But in the 15 years from 1974 through 1988 there have been 57. Exit inquiries to 26 judges who resigned in the last ten years, conducted by the Judicial Conference Committee on the Judicial Branch, showed that almost all of the departing judges noted financial considerations as a factor in their decision. The frequency of judicial resignations is now being matched by greater difficulties in recruitment. As Chief Justice Burger testified: "I know of one situation

where the first ten people who were invited to take the appointment on a Court of Appeals declined because they could not afford it. The 11th person accepted the appointment."

The Judicial Conference's survey indicates that 73% of judges now on the bench took a pay cut when appointed, and that the average salary was \$69,708. A review of law firm pay scales clearly demonstrates the dilemma for a successful attorney with more than 15 years experience and family obligations. The Altman and Will *1988 Survey of Law Firm Economics* indicates that partners in law firms in cities of 250,000 to 500,000 with 10 to 15 years experience make an average of \$125,504; in cities over one million they make an average of \$140,577, while those who are the most successful average \$217,304. Judges who leave the federal bench can earn much more than these average figures.

Indeed, we now pay our judges less than other leading nations. Great Britain and Canada, the two common law systems most like our own, each pay their judges significantly more than we do.

Honoraria and Outside Earned Income

Since the Code of Conduct for United States Judges restricts most forms of outside earned income for judges, the acceptance of honoraria has remained a relatively minor source of supplemental income for the judiciary. Judges may however, subject to the proper performance of their judicial duties, speak, write, lecture, teach and participate in other activities concerning the law, the legal system and the administration of justice. They may likewise speak, teach, and write on non-legal subjects as long as these activities do not detract from the dignity of the office or interfere with the performance of judicial duties. They may accept honoraria for such services up to \$2,000 per appearance. In 1987, only 110 of 907 Federal

District and Circuit Court judges reported accepting any honoraria. Only nine of these judges received more than \$5,000 for the year.

If Congress allows substantial increases for all branches to take effect while it also abolishes honoraria for its own members, it is appropriate that honoraria be abolished in all three branches. This would leave judges free to receive outside compensation for continuing activities such as writing scholarly texts or sustained law teaching since such activities are excluded from the definition of honoraria, and usually do not conflict or appear to conflict with their official duties.

CONCLUSION

Last year we celebrated the Bicentenary of our Constitution. We engaged in justifiable self-congratulation knowing that a small group of extraordinarily wise men had created the greatest charter of government ever known to mortal man. How fortunate for us as a people that our Constitution has flourished for two centuries as the embodiment of freedom and serves as the symbol of democracy around the world.

But a Constitution is not self-enforcing. Wise men and women in all branches of government are needed to govern the nation and to give living meaning to the Constitution's precepts and guarantees.

The wise men and women we need can be found in all walks of life and all levels of economic resources. Our government has never been, nor should it ever be, a government of, by, or for the rich. Talented men and women at all income levels can and do make valuable contributions to our federal public service. Just as we need their talents, they deserve to be equitably compensated for the service they render and for the contributions they make for the public good. Fairness to them is in the self-interest of us all.

APPENDIX B

SUMMARY OF EXECUTIVE, LEGISLATIVE AND JUDICIAL RULES
ON HONORARIA, OUTSIDE EARNED INCOME, TRAVEL AND FINANCIAL DISCLOSURE

	EXECUTIVE	CONGRESS	JUDICIAL
1. Honoraria (Appearance, speech or article for which participant gets paid, excluding awards and payments for continuing services (e.g. teaching))	<i>Federal Election Campaign Act Amendments, 2 U.S.C. 441(i):</i> \$2,000 limit for each appearance, speech or article, exclusive of travel.	<i>Federal Election Campaign Act Amendments, 2 U.S.C. 441(i):</i> \$2,000 limit for each appearance, speech or article, exclusive of travel. <i>Home Rule XI.VII:</i> Reinforces \$2,000 limitation. (See also earned income ceiling <i>infra</i>).	<i>Federal Election Campaign Act Amendments, 2 U.S.C. 441(i):</i> \$2,000 limit for each appearance, speech or article, exclusive of travel.
2. Outside earned Income (Practice of professional skills, books, etc.)	<i>Ethics in Government Act of 1978 as Amended:</i> 15% of salary limitation on the annual outside earned income, including honoraria of Presidential appointees. <i>Conflict of Interest, 18 U.S.C. 208:</i> Generally prohibits taking any action on any matter in which employee has a personal financial interest. <i>Executive Order 11222:</i> Prescribes Standards of ethical conduct for Government officers and employees. Prohibits any interest that conflicts with or appears to conflict with official duties.	<i>House Rule XI.VII:</i> Limits all outside earned income, including honoraria received by Representatives to no more than 30% of their Congressional salary. <i>Senate:</i> 2 U.S.C. 31-1 provides no outside earned income limit. Aggregate honoraria may not exceed 40% of Senator's annual salary. (P.L. 98-190).	<i>Code of Conduct for United States Judges, Canon 6:</i> A judge may receive compensation and reimbursement of expenses for the law-related and extra-judicial activities permitted by the Code of Judicial Conduct if the source of such payment doesn't give the appearance of influencing the judge in the judge's judicial duties or otherwise give the appearance of impropriety. <i>Canon 6A:</i> Compensation should not exceed a reasonable amount nor should it exceed what a non-judge would receive for the same activity.

Office of Personnel Management Regulations (part 735) are the implementing regulations for the Executive Order and are the general standard of conduct for the Executive branch.

3. Other Overriding Limits

OPM Regulations (Part 735.203):

An employee who is a Presidential appointee shall not receive compensation or anything of monetary value for any consultation, lecture, discussion, writing or appearance the subject matter of which is devoted substantially to the responsibilities, programs, or operations of his agency, or which draws substantially on official data or ideas which have not become part of the body of public information.

Section 209 of 18 U.S.C. prohibits all government employees from receiving compensation from any source other than the Federal Government for their official duties. In the context of lecturing and writing, Section 209 prohibits a government employee, with limited exceptions, from accepting an honorarium or other compensation from an outside source for speeches given or articles written in the course of the employee's official duties. In light

House and Senate: Both Representatives and Senators are prohibited from:

- Receiving or soliciting compensation for "services rendered or to be rendered" before Federal agencies (18 U.S.C. 203).
- Engaging in certain acts of "self dealing" with private foundations (26 U.S.C. 4941, 4946).

- Receiving any compensation of any kind from foreign governments (U.S. Constitution, Art. 1, Sec. 9).
- Practicing in some areas of laws (18 U.S.C. 203, 204; 25 U.S.C. 70; 46 U.S.C. 1223; 5 U.S.C. 501).
- Accepting benefits which "might be construed by reasonable persons as influencing the performance of (their-official duties)" (72 Stat., Part II, B 2, para. 5).

28 U.S.C. 454. The practice of law by justices and judges of the United States prohibited.

Canon 5

A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties or exploit his judicial position.

- A judge may hold and manage investments and engage in other remunerative activity, but should not serve as an officer, director, active partner, manager, advisor, or employee of any business other than a business wholly owned by members of the judge's family. A judge should manage his financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious

of that provision, a government employee participating officially in a conference or seminar sponsored by a private entity may not receive an honorarium or other supplementation of salary from the sponsoring entity.

With respect to lecturing and writing as an outside activity, *Section 202 of Executive Order 11222* establishes the framework for Executive branch policy in this area as follows:

"An employee shall not engage in any outside employment, including teaching, lecturing or writing, which might result in a conflict, or an apparent conflict, between the private interests of the employee and his official government duties and responsibilities, although such teaching, lecturing and writing by employees are generally to be encouraged so long as the laws, the provisions of this Order, and Civil Service Commission and agency regulations covering conflict of interest and outside employment are observed."

— Receiving compensation as a result of "influence improperly exerted" from their Congressional position [House Rule XI.II(3)]; Senate Rule XXXVII(1.)].

Senate: Senators are prohibited from:

- Engaging in outside employment for compensation which is in conflict with the performance of official duties [Senate Rule XXXVII(2)].
- Affiliating with a firm, partnership, or association for the purpose of providing professional services for compensation; permitting his or her name to be used by such an organization; and practicing any profession for compensation "to any extent" during regular office hours of the Senate [Senate Rule XXXVII(5)].
- Serving on the board of any regulated or publicly held business corporations unless certain specified conditions have been met [Senate Rule XXXVII(6)].

financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.

Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor or loan from anyone except in specific conditions.

Travel Expenses

Federal Election Campaign Act Amendments 2 U.S.C. 441(i): Actual travel and subsistence expenses for such person and his/her spouse or an aide.

General Services Administration issues travel regulations that apply to all Federal agencies: Additionally, certain agencies have gift acceptance authority which allow private groups to pay travel.

Federal Election Campaign Act Amendments 2 U.S.C. 441(i): Actual travel and subsistence expenses for such person and his/her spouse or an aide.

Congressional Ethics Rules

- Members are banned from accepting gifts worth more than \$100 from groups, individuals or corporations with a direct interest in federal laws.
- The Senate defines that interest by the existence of a PAC or registered lobbyist.
- The House definition bans gifts from interests with registered lobbyists or others with a direct interest in legislation before Congress.
- However, travel can be reimbursed by interest groups for expenses incurred in connection with speaking engagement and fact finding tours.
[Senate Rule XXXV and House Rule XI III(4)].

Federal Election Campaign Act Amendments 2 U.S.C. 441(i): Actual travel and subsistence expenses for such person and his/her spouse or an aide.

Canon 6B: Limit expense reimbursement actual cost of travel, food and lodging incurred by the judge and where appropriate, by the judge's spouse.

TO SERVE WITH HONOR:

REPORT OF THE
PRESIDENT'S COMMISSION ON
FEDERAL ETHICS LAW
REFORM

March 1989

RECOMMENDATION 6

The Commission recommends (1) that federal employees in all three branches be prohibited from receiving honoraria, (2) that existing criminal prohibitions against supplementing government salaries apply to all three branches, and (3) that senior employees in all three branches be covered by a uniform percentage cap on outside earned income, but that the President have authority to exempt categories of earned income from the cap that do not present significant issues of ethical propriety or interfere with the full performance of job duties.

A. Present Law

A variety of statutes and rules limit receipt by federal employees of honoraria and outside earned income. Employees in all three branches of government are covered by 2 U.S.C. § 441i, which prohibits the receipt of an honorarium of more than \$2,000 (exclusive of travel and subsistence). The statute allows payments in excess of the \$2,000 cap to be donated to charity. In addition to this cross-cutting statute, there are other, branch-specific, restrictions on receipt of honoraria and outside earned income. There are also additional restrictions as to particular types of outside activities.

In the executive branch, one of the chief existing limitations is 18 U.S.C. § 209, which criminalizes private supplementation of the salaries of executive branch employees other than special government employees. Specifically:

Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States . . . from any source other than the Government of the United States . . . ; . . .

... Shall be fined not more than \$5,000 or imprisoned not more than one year, or both.

18 U.S.C. § 209(a). It is also a crime to make a payment, the receipt of which violates the above prohibition. The prohibition does not prevent an individual from continuing to participate in a bona fide pension, retirement plan, health plan, or other employee welfare or benefit plan maintained by a former employer.

The § 209 prohibition prevents executive branch employees from receiving supplementary compensation for activities that fall within the scope of their ordinary duties. Thus, executive branch employees cannot, for example, receive honoraria for speeches given in their official capacities. Similarly, executive branch employees cannot be paid for writings done as a part of their official employment, and the Office of Government Ethics has interpreted this provision to prohibit the designation of a third party to receive any such payments that cannot be received directly. As a result of § 209 and Executive Order 11222, 3 C.F.R. 306 (1964-1965), agency heads, the highest level Presidential appointees in the Executive Office of the President, and full-time members of boards and commissions appointed by the President are not permitted to receive anything of monetary value for any consultation, lecture, discussion, writing or appearance the subject of which is devoted substantially to the responsibilities of their agency. (Another frequent consequence of § 209, unrelated to the receipt of honoraria, is that it prevents individuals entering the executive branch from receiving severance pay based on future government service rather than past service to their employer.) There is no statute comparable to § 209 that applies to the other two branches of government.

The other key statutory limit applicable to the executive branch is § 210 of the Ethics in Government Act, which limits outside earned income for certain high-paid executive employees to 15 percent of the individual's salary. Covered employees are (1) those at compensated at GS-16 or above in nonjudicial positions who are required to be appointed by the President with Senate confirmation, and (2) White House Office employees compensated at Executive Level II or above.

In the legislative branch, no Member of Congress may receive honoraria (exclusive of travel expenses) in excess of 40 percent of the individual's salary. 2 U.S.C. § 31-1. Excessive honoraria must be donated to charity. *Id.* In the House of Representatives, House Rule XLVII further restricts the total amount of honoraria (exclusive of travel costs) and outside earned income (from personal services) to no more than 30 percent of a Member's salary during single calendar year. Honoraria amounts must be within the usual and customary value for a speech, article, or similar activity.

Outside income of judges is not restricted by law. Canon 6 of the Code of Conduct for United States Judges permits judges to receive compensation and reimbursement of expenses for the law-related and extra-judicial activities permitted by the Code, to the extent that there is no appearance of impropriety. There is no dollar limit but the compensation must not exceed a reasonable amount nor what a person who is not a judge would receive for the same activity. Judges may speak, write, and lecture on legal and non-legal topics as long as their activities do not detract from the dignity of the office or interfere with the performance of their judicial duties. Canon 5.

In addition to these limitations on the *income* that can be earned from particular kinds of activities, an eclectic set of rules and statutes set substantive limits on the kind of

activities that employees are allowed to undertake. Executive branch standards of conduct regulations, for example, often require prior approval of outside activities by federal employees and prohibit outside activities that interfere with an employee's performance of job duties. Employees are also typically prohibited from advancing a private interest through the use of non-public official information gained in connection with their employment and are prohibited from using official resources (such as time, personnel, and supplies) for private activities. There are also special statutes applying to specific positions, *e.g.*, 37 U.S.C. § 801(a), prohibits an active duty naval officer from employment by anyone furnishing naval supplies or war materials to the United States.

As to the legislative branch, Senate Rule XXXVII prohibits Senators and staff members paid more than \$25,000 per year from being affiliated with a firm for the purpose of providing paid professional services and also in many circumstances prohibits service on the board of directors of for-profit publicly held corporations or publicly regulated corporations.

With regard to the judiciary, the practice of law by judges is prohibited by 28 U.S.C. § 254. In addition, Canon 5 of the Code of Conduct for United States Judges prohibits a judge from serving as an officer, director, active partner, manager, advisor, or employee of any business other than a business wholly owned by members of the judge's family.

B. Considerations

The Commission took special note of the extreme lack of uniformity across the three branches of government in the rules governing honoraria and other outside income. Whereas executive branch officials cannot receive any out-

side compensation at all for speeches in their official capacities, Members of Congress are free to accept honoraria for such speeches (as well as compensation for travel expenses, which may often be above those required for the event itself). Borrowing a definition from the Quadrennial Commission, we are using the term honoraria at this point to include "payments for public appearances to deliver a talk or engage in a colloquy at the invitation of some non-government group." Commission on Executive, Legislation and Judicial Salaries *Fairness for Our Public Servants* 24 (1988) [hereinafter cited as the Quadrennial Commission Report].

We recognize that speeches by federal officials can help inform the public or particular groups and may encourage interchange between the public and private sectors. Nevertheless, we can see no justification for perpetuating the current system of honoraria. Honoraria paid to officials can be a camouflage for efforts by individuals or entities to gain the officials' favor. The companies that pay honoraria and related travel expenses frequently deem these payments to be normal business expenses and likely believe that these payments enhance their access to the public officials who receive them. Thus, we agree with the Quadrennial Commission that "public faith in the integrity of the Members it elects is threatened by the steady growth of this practice." Quadrennial Commission Report at 24. The further harm in tolerating honoraria is that such payments encourage outside speeches and travel by federal officials and employees, activities that take time and energy away from the individual's other federal duties.

Although we are aware of no special problems associated with receipt of honoraria within the judiciary, the Commission—in the interest of alleviating abuses in the legislative branch and in applying equitable limitations across the government—joins the Quadrennial Commis-

sion in recommending the enactment of legislation to ban the receipt of honoraria by all officials and employees in all three branches of government. In recommending this ban, we also recognize, as did the Quadrennial Commission, that the statutory definition of honoraria must be broad enough to—

close present and potential loopholes such as receipt of consulting, professional or similar fees; payments for serving on boards; travel; sport, or other entertainment expenses not reasonably necessary for the appearance involved; or any other benefit that is the substantial equivalent of an honorarium.

Id. To curtail the risk that individuals will find a way to circumvent these restrictions, the bar on honoraria necessarily needs to extend both to activities related to an individual's official duties and to other activities. It is worth stating, however, that as we conceive of it, the bar on receipt of honoraria would not prohibit payment for continuing activities such as teaching academic, for-credit, courses, or publication of a book through a recognized publishing house to be distributed through usual and customary channels.

We recognize that banning honoraria would have a substantial financial cost to many officials. We feel strongly, however, that the current ailment is a serious one and that this medicine is no more bitter than is needed to cure the patient.

In addition, to carry out our general mandate of making more equitable the ethical standards for the three branches of government, the Commission recommends the enactment of legislation extending 18 U.S.C. § 209 to Congress and the judiciary. We can think of no reason why supplementation of salaries is any more acceptable in the legislative and judicial branches than in the executive branch.

This proposed extension of § 209 would newly make it a criminal offense for any official or employee in the legislative or judicial branches to accept private compensation for the performance of their government duties.

A number of issues would need to be worked out concerning the effect of § 209 as to the legislative and judicial branches. The basic effect of the change, however, would be to expand the criminal prohibition to cover the receipt by Members of Congress and other legislative branch employees of payment for speeches or writing dealing with their official responsibilities or topics that are the subject of pending legislation. Similarly, the amended statute would prohibit judges and other judicial branch employees from being paid for speeches discussing pending cases (which they may be unlikely to do in any event) or about the workings of their courts. (Extending the scope of § 209 would also extend the limitations mentioned earlier on receipt of severance pay intended as a supplement to government salary.)

Finally, the Commission is also recommending that Congress enact legislation establishing a uniform cap on the outside earned income of senior officials in all three branches of the federal government. A number of Commission members believe that there are categories of outside activity that neither interfere with the full performance of official duties nor pose significant ethical issues. As a result, in order to ensure that this outside-earned-income limit is not needlessly restrictive, we recommend that the legislation give the President the authority to grant exemptions from the cap for earned income resulting from categories of outside activities that he determines to meet these two standards.

The level of the cap should be set at a percentage of the official's salary. We recommend that the percentage level be determined by Congress after appropriate hearings, but

we are inclined to believe that an appropriate figure would be closer to the 15-percent limit currently applicable to senior executive branch employees than, say, the 30-percent limit applicable to Members of the House of Representatives. For parallelism with the executive branch, the individuals subject to this income cap in the legislative and judicial branches would be Members of Congress, judges, and other officials and employees in both branches who are not in the career civil service and whose positions are compensated at GS-16 and above.

The Commission recognizes that federal employees engage in a wide range of income-producing activities. Many high level officials teach an occasional college or graduate school course. For example, many federal judges may have accepted judicial appointments in the knowledge that the Code of Judicial Conduct permitted them to continue teaching law courses and publishing learned treatises or texts. Other officials may write scholarly articles or even novels. Still others may raise pedigreed horses, produce and market gourmet food, lead exercises classes, or engage in any number of other money-making activities entirely unrelated to their federal jobs. As a general matter, we would not want to preclude or discourage these activities, which can benefit both the federal employees and society at large.

In order for an employee to do his job properly, however, such activities need to be restricted in time and scope to avoid the real risk that outside income-producing activities will take time and energy away from official activities (even if only through the accumulation of such minor intrusions such as occasional phone calls and concomitant use of support staff to take phone messages). Of course, the same kinds of activities may also be carried out without thought of payment. In a necessary effort to generalize, however, the Commission believes that paid

outside work is more likely to engross the federal employee to the extent of creating an interference with the individual's basic duties. This seems to be particularly likely to occur when the outside income assumes a substantial proportion of an official's compensation in relation to the federal salary.

In closing, it is worth pointing out that none of the three components of this recommendation is intended to affect existing rules regarding whether federal employees can undertake any particular activity. The reforms included in this recommendation go only to the question of whether an employee can be *paid* for a particular activity, not whether the employee is or is not allowed to engage in the activity in the first place.

C. Alternatives Considered

The Commission considered whether to tie the proposed restrictions on honoraria and outside earned income to an increase in the current low pay levels for many federal workers. Although we recognize that federal salary levels are too low in all branches (and particularly in the judiciary), we did not see, in good conscience, how we could suggest holding off on the adoption of our recommendations until pay levels were raised to a more adequate level. First, we regard the current state of affairs as to honoraria in particular as unacceptable in the extreme, and believe that we cannot wait until an unspecified date in the future to end this harmful practice. We believe, however, that in addition to enacting a law abolishing honoraria payments in all three branches, Congress and the President should promptly reconsider raising the salaries of top officials in all three branches to offset the past erosion of these salaries by inflation. To defuse some of the political concerns about a pay raise, one approach

might be for Congress to enact a raise that does not take effect, as to any given congressional seat, until after the next general election for that seat.

The Commission also considered whether it was appropriate to impose a flat ban on outside earned income by all federal employees, or in the alternative, by the highest paid federal employees. In view of the diverse circumstances of federal employees, we felt that an across-the-board ban on outside earned income was unnecessary and too harsh. Such a ban would prevent all federal employees from even the most innocuous weekend income-producing activities, such as selling prize-winning roses, baby-sitting, or, conceivably, holding a garage sale. We saw no need to micro-manage the lives of federal employees to this degree.

The Commission considered whether particular types of employment should be exempted by statute from the limitation on outside earned income. Royalty income in particular was considered as one possible exception. The Office of Government Ethics considers advances on royalties paid by a publisher during the period in which a book is being written to be earned income, but royalties paid to the author after the work is published are treated as income generated by a property interest and are not counted against the current 15-percent limit. Rather than try to assess the merits of the many particular types of outside activity that generate earned income, however, we thought it best to give the President the authority to exempt from the ban activities that he determines neither interfere with performance of official duties nor represent an ethical problem.

In the Supreme Court of the United States

No. 93-1170

UNITED STATES, ET AL.,

PETITIONERS

v.

NATIONAL TREASURY EMPLOYEES UNION, ET AL.

ORDER ALLOWING CERTIORARI. Filed April 18, 1994.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

April 18, 1994

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No. 93-1170

Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

NATIONAL TREASURY EMPLOYEES UNION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

Section 501(b) of the Ethics in Government Act of 1978, as amended, 5 U.S.C. App. 501(b) (Supp. IV 1992), prohibits the receipt of payment for appearances, speeches, or articles by Members of Congress and by employees and officers in all three branches of government. The questions presented are:

1. Whether Section 501(b) violates the First Amendment rights of employees in the Executive Branch by prohibiting honoraria when neither the expression nor the payor has a nexus to federal employment.

2. Whether, if Section 501(b) does infringe the First Amendment to that extent, the court of appeals erred in invalidating Section 501(b) as applied to all honoraria received by Executive Branch employees, rather than invalidating it only as applied to cases where neither the expression nor the payor has a nexus to federal employment.

II

PARTIES TO THE PROCEEDING

The parties to the proceeding below were the United States, the Office of Government Ethics, the Attorney General, the Director of the Office of Government Ethics, the National Treasury Employees Union, Jan Adams Grant, Thomas C. Fishell,* the American Federation of Government Employees, David E. Hubler, Peter G. Crane, Richard Deutsch, William H. Feyer, Judith L. Hanna, George J. Jackson, Eduard Mark, Arnold A. Putnam, Charles E. Fager, and Robert A. Gordon. The district court also certified a class representing all employees in the Executive Branch below the grade of GS-16.

* Mr. Fishell, who was a respondent when the petition was filed, has left federal employment, and the writ of certiorari has been dismissed with respect to him pursuant to Sup. Ct. R. 46.1.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-58a, is reported at 990 F.2d 1271. The opinions filed on the denial of rehearing en banc, Pet. App. 80a-107a, are reported at 3 F.3d 1555. The opinion of the district court, Pet. App. 59a-78a, is reported at 788 F. Supp. 4. An opinion of the court of appeals affirming the denial of a preliminary injunction is reported at 927 F.2d 1253.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1993. A petition for rehearing was denied on September 21, 1993. On December 10, 1993, the Chief Justice extended the time within which to

(1)

file a petition for a writ of certiorari to and including January 19, 1994, and the petition was filed on that date. The Court granted the petition on April 18, 1994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTION, STATUTE, AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law * * * abridging the freedom of speech." The relevant portion of the Ethics in Government Act of 1978, as amended, 5 U.S.C. App. 501 *et seq.* (Supp. IV 1992), is set forth in the appendix to the petition. Pet. App. 108a-113a. The relevant regulations implementing that Act are set forth in the appendix to the petition. Pet. App. 114a-134a.

STATEMENT

A. The Background And Enactment Of The Honorarium Ban

1. Congress has long placed restraints on the ability of federal employees to accept honoraria for appearances, speeches, and articles. In 1974, Congress prohibited any "elected or appointed officer or employee of any branch of the Federal Government" from accepting any honorarium of more than \$1,000 (excluding expenses) for any "appearance, speech, or article," or from accepting more than \$15,000 in total honoraria payments during any calendar year.¹ In 1976, Congress raised those limits to \$2,000 per

¹ Pub. L. No. 93-443, § 101(f)(1), 88 Stat. 1268 (1974), formerly codified at 18 U.S.C. 616 (Supp. IV 1974) (repealed).

appearance, speech, or article and to \$25,000 per year.² Later, Congress removed the \$25,000 limitation, but then capped the annual receipt of honoraria for Members of Congress at 30%, and then 40%, of the Members' salaries.³ None of those provisions was limited to honoraria received for expressive activities that were related to the speaker's federal employment; rather, all of them extended also to expressive activities that bore no such relation.

These provisions failed to eliminate concerns about the propriety of honoraria payments.⁴ In the late 1980s, two blue-ribbon commissions expressed the view that the existing limits on the receipt of honoraria were inadequate.⁵ The commissions noted that receipt of honoraria by Members of Congress had created an appearance of impropriety and had undermined the public's confidence in the integrity of public officials. The report of the Quadrennial Commission concluded that "[t]he potential for abuse or the appearance of abuse is obvious to the public" and

² Pub. L. No. 94-283, § 112(2), 90 Stat. 494 (1976), formerly codified at 2 U.S.C. 441i (1976) (repealed).

³ See Pub. L. No. 97-51, § 130(a), 95 Stat. 966 (1981); Pub. L. No. 98-63, § 908(b), 97 Stat. 337 (1983); Pub. L. No. 99-190, § 137, 99 Stat. 1323 (1985), formerly codified at 2 U.S.C. 31-1(b) (1988) (repealed).

⁴ See *Report of the House Bipartisan Task Force on Ethics on H.R. 3660*, 101st Cong., 1st Sess. (Comm. Print 1989), reprinted at 135 Cong. Rec. 30,740, 30,744 (1989).

⁵ See *Fairness for Our Public Servants: The Report of The 1989 Commission on Executive, Legislative and Judicial Salaries* 24 (Dec. 1988) (*Quadrennial Commission Report*) (J.A. 233); *To Serve with Honor: Report of the President's Commission on Federal Ethics Law Reform* 35-36 (Mar. 1989) (*Wilkey Commission Report*) (J.A. 252-254).

that public trust has been "threatened by the steady growth of th[e] practice" of receiving honoraria.⁶ The President's Commission on Federal Ethics Law Reform—created to "review Federal ethics laws, Executive orders, and policies and * * * make recommendations to the President for legislative, administrative, and other reforms needed to ensure full public confidence in the integrity of all Federal public officials and employees"⁷—came to a similar conclusion. That commission, chaired by the Honorable Malcolm R. Wilkey, concluded that "[h]onoraria paid to officials can be a camouflage for efforts by individuals or entities to gain the officials' favor" and that "the current ailment [caused by accepting honoraria] is a serious one."⁸

Both commissions recommended legislation totally prohibiting the receipt of honoraria in all three branches. The Wilkey Commission stated that, "in the interest of alleviating abuses in the legislative branch and in applying equitable limitations across the government," it "joins the Quadrennial Commission in recommending the enactment of legislation to ban the receipt on honoraria by all officials and employees in all three branches of government."⁹ The Wilkey Commission concluded that the ban must be a comprehensive one to achieve its purpose: "To curtail the risk that individuals will find a way to circumvent these restrictions, the bar on honoraria

⁶ *Quadrennial Commission Report* at 24 (J.A. 233).

⁷ Exec. Order No. 12,668, 3 C.F.R. 210, 211 (1989 comp.).

⁸ *Wilkey Commission Report* at 35-36 (J.A. 253-254).

⁹ *Wilkey Commission Report* at 35-36 (J.A. 253-254); see *Quadrennial Commission Report* at 24 (J.A. 234).

necessarily needs to extend both to activities related to an individual's official duties and to other activities."¹⁰

2. In the Ethics Reform Act of 1989 (Reform Act), Pub. L. No. 101-194, 103 Stat. 1716—"a good part of [which] is based on the recommendations of the President's ethics commission"¹¹—Congress amended the Ethics in Government Act of 1978 (Ethics Act) to provide that Members of Congress and officers and employees of the federal government "may not receive any honorarium while that individual is a Member, officer or employee."¹² Reform Act § 601(a), 103 Stat. 1760, codified at 5 U.S.C. App. 501(b) (Supp. IV 1992). The prohibition was made applicable to all officers or employees of the federal government except for Senators, senate staff, and "special Government employee[s]," as defined in 18 U.S.C. 202. Reform Act § 601(a), 103 Stat. 1761-1762, codified at 5 U.S.C. App. 505(1) and (2) (Supp. I 1989). The term "honorarium" was defined to mean

a payment of money or any thing of value for an appearance, speech or article by a Member,

¹⁰ *Wilkey Commission Report* at 36 (J.A. 254).

¹¹ 135 Cong. Rec. H8747-H8748 (daily ed. Nov. 16, 1989) (remarks of Rep. Martin). See also S. Rep. No. 29, 102d Cong., 1st Sess. 3 (1991) ("Many provisions of the Ethics Reform Act, including the honoraria ban, were based on the recommendations of the President's Commission on Federal Ethics Law Reform. That Commission supported an absolute ban on honoraria for all Government Officers and employees.") (footnote omitted).

¹² Congress also provided that if an honorarium up to \$2,000 is paid on behalf of the official to a qualifying charitable organization, it shall not be deemed to be received by the official. 5 U.S.C. App. 501(c) (Supp. IV 1992).

officer or employee, excluding any actual and necessary travel expenses incurred by such individual * * *.

Reform Act § 601(a), 103 Stat. 1762, codified at 5 U.S.C. App. 505(3) (Supp. I 1989).

In 1991, Congress amended Section 505 by extending the prohibition against the receipt of honoraria to the Senate and its staff. Congressional Operations Appropriations Act, 1992, Pub. L. No. 102-90, Tit. I, § 6(b)(2), 105 Stat. 450 (1991). Congress also amended the definition of honorarium to deal specifically with a series of appearances, speeches, or articles. Legislative Branch Appropriations Act, 1992, Pub. L. No. 102-90, § 314(b), 105 Stat. 469 (1991). The definition, as amended, now reads:

The term "honorarium" means a payment of money or any thing of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government) by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual * * *.

5 U.S.C. App. 505(3) (Supp. IV 1992).

With respect to Executive Branch officers and employees, the honorarium ban is administered by designated agency ethics officers. 5 U.S.C. App. 503(2) (Supp. IV 1992). The ban is enforceable through an action brought by the Attorney General seeking a civil penalty of not more than \$10,000 or the amount of prohibited compensation received, whichever is greater. 5 U.S.C. App. 504(a) (Supp. IV 1992). If, however, an individual has received an advisory

opinion from the Office of Government Ethics (OGE) or a designated ethics entity and acts in good faith in accordance with the opinion, that individual is not subject to the civil sanction authorized by the Act. 5 U.S.C. App. 504(b) (Supp. IV 1992).

As the Ethics Act specifically authorizes, see 5 U.S.C. App. 503(2) (Supp. IV 1992), OGE has promulgated rules and regulations to implement the Act. 5 C.F.R. 2636.201 *et seq.* The regulations make clear that Section 501(b) does not prevent federal employees from accepting reimbursement for a wide variety of expenses associated with giving speeches, producing articles, or making appearances. 5 C.F.R. 2636.203(a). The regulations also provide that the ban on honoraria does not reach compensation for teaching a course involving multiple presentations at accredited programs or institutions. 5 C.F.R. 2636.203(a)(8) and (9). "Appearance" is defined to exclude "performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display." 5 C.F.R. 2636.203(b). "Speech" does not include the "recitation of scripted material, as for a live or recorded theatrical production," nor does it include the "conduct of worship services or religious ceremonies." 5 C.F.R. 2636.203(c). And "[a]rticle" does not include "works of fiction, poetry, lyrics, or script." 5 C.F.R. 2636.203(d).

B. The Current Controversy

1. Section 501(b) was enacted into law on November 30, 1989, and was to take effect on January 1, 1991. Reform Act § 603, 103 Stat. 1763. In late 1990, before the provision went into effect, several Executive Branch employees and unions that represent them commenced actions challenging the ban in

the United States District Court for the District of Columbia.¹³ The actions claimed that the honorarium ban violates the First Amendment and requested an injunction against its enforcement.¹⁴ Pet. App. 3a, 60a-61a; J.A. 1-35. The district court consolidated the actions, certified a class of all federal employees in the Executive Branch below grade GS-16 who would receive honoraria but for the prohibition contained in Section 501(b), and granted summary judgment in favor of the plaintiffs. Pet. App. 3a, 60a, 78a.

The court ruled that Section 501(b) violates the First Amendment rights of Executive Branch employees because it is "over-inclusive" in prohibiting the receipt of honoraria for expressive activities despite the absence of a relationship between the subject matter of the expression and the employee's federal employment or the identity or motives of the payor. Pet. App. 73a. The court also ruled that the

¹³ As the district court noted, the individual plaintiffs are "currently employed full-time" in executive departments and agencies and include "a Nuclear Regulatory Commission lawyer who writes on Russian history (Crane); a Voice of America editor whose many published articles are generally on matters of international economics (Deutsch); a microbiologist at the Food and Drug Administration who reviews dance performances for print and broadcast media (Jackson); * * * and a civilian electronics technician for the U.S. Navy and a spare-time scholar/author on ironclad vessel technology of Civil War vintage (Putnam)." Pet. App. 60a, 61a n.1.

¹⁴ Respondents also requested a preliminary injunction. The district court denied that relief, and its denial was upheld on appeal. *National Treasury Employees Union v. United States*, 927 F.2d 1253 (D.C. Cir. 1991).

provision is constitutionally "under-inclusive" because it permits artists or performers to receive compensation while barring similar payments to speechmakers and essayists. *Ibid.* As relief, the court struck down the honorarium ban in its entirety as applied to Executive Branch employees, but left the ban intact as applied to officers and employees in the Legislative and Judicial Branches.¹⁵ *Id.* at 73a-78a.

2. A divided court of appeals affirmed. Pet. App. 1a-58a. Applying *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), the majority concluded that Section 501(b) violates the First Amendment rights of federal employees, because the honorarium ban is not "narrowly tailored." Pet. App. 14a. The court noted that Section 501(b) prohibits honoraria even when there is no "nexus between the employee's job and either the subject matter of the expression or the character of the payor." *Id.* at 9a. It concluded that, absent such a nexus, the receipt of honoraria would create neither actual impropriety nor the appearance of impropriety on the part of federal employees. *Ibid.* The court also concluded that Congress's across-the-board ban on the receipt of honoraria by Executive Branch employees could not be justified as a prophylactic measure to prevent abuses or to avoid the administrative burdens that would arise in determining whether particular compensated speech has a nexus to federal employment. *Id.* at 11a-14a.

¹⁵ The district court enjoined the government from enforcing the ban, but stayed its judgment and permanent injunction "pending completion of proceedings on any timely appeal." Pet. App. 78a.

Having held that Section 501(b) has an unconstitutional "excess sweep," the court of appeals turned to the issue of remedy. Pet. App. 14a. The court recognized that it should "refrain from invalidating more of the statute than is necessary." *Ibid.* (citation omitted). Nevertheless, the court concluded that Section 501(b) must fall in its entirety as applied to Executive Branch employees because the provision "does not seem to admit of any construction that would trim off all or even most of the invalid applications to executive branch employees." Pet. App. 14a. The court stated that "[a]rticulation of some appropriate nexus test" to limit Section 501(b) to constitutional scope "would seem a purely legislative act." *Ibid.*

The court of appeals found, however, that the application of the honorarium ban to the Legislative and Judicial Branches could be saved. Pet. App. 14a-15a. The court noted that respondents had not argued that the honorarium ban is unconstitutional as applied to congressional or judicial officers and employees and that such a claim would implicate different considerations. *Ibid.* The court also concluded that Congress "clearly would have gone forward [with Section 501(b)] as to the legislative branch and in all probability as to the judicial [branch]," even if Congress had known of the provision's "unconstitutionality as applied to executive branch employees." *Id.* at 15a. Applying severability principles, the court therefore left Section 501(b) in force as applied to the Legislative and Judicial Branches. *Id.* at 17a-18a.

Judge Sentelle filed a lengthy dissent. Pet. App. 20a-58a. He argued that the majority had erred in evaluating the facial constitutionality of Section

501(b), rather than considering the case simply as a challenge to the honorarium ban as applied to the plaintiffs. He also contended, on the merits, that the flat ban on honoraria is justified by the government interest in avoiding the appearance of impropriety on the part of Executive Branch employees, and by the government interest in devising an administrable prohibition. Finally, he believed that the majority had erred in determining which applications of the statute to sever.¹⁸

Over the dissent of two judges, the court of appeals denied the government's request for rehearing and rehearing en banc. Pet. App. 79a, 80a-81a.

SUMMARY OF ARGUMENT

I. The honorarium ban is consistent with the requirements of the First Amendment. When Congress regulates speech by federal employees, the Constitution requires that the employees' interest in free expression be weighed against the government's interest in effectively carrying out the public tasks committed to its care. Under that test, Congress has latitude to impose restraints on employees where the regulated conduct may reasonably be thought to threaten the efficiency of government operations.

¹⁸ Judge Sentelle argued that "the majority's severance in this case is nothing less than judicial legislation." Pet. App. 54a (internal quotation marks omitted). He maintained that the majority had inserted "words of limitation" into the statute in order to confine its ruling to the Executive Branch, *ibid.*; in his view, the majority's analysis should have led it to strike the phrase "'officer or employee' in its entirety from the statute, leaving the honorarium ban in place only as to Members of Congress." *Id.* at 57a.

In this case, the burden placed on federal employees in the Executive Branch by the honorarium ban is modest. The ban does not prevent or punish speech of any kind; rather it bans only the receipt of payment for employee speech. The limited detriment imposed by this sort of limitation on the outside earnings of federal employees is outweighed by the government's legitimate interests. The ban serves to promote the integrity and the appearance of integrity of the federal workforce; it prevents the evasion that a more limited rule might permit; and it avoids the enforcement problems that would be presented by a more permeable and nuanced ban.

The court of appeals invalidated the ban because it prohibits honoraria even when the expression is unrelated to federal employment and the payment is received from parties with no interest in currying favor with the employee. In doing so, the court incorrectly declined to apply this Court's cases upholding prophylactic regulations of employee speech, relied instead on inapplicable cases dealing with fully protected private speech, and improperly refused to credit Congress's judgment that a government-wide flat ban was required to prevent abuses. The court's nondeferential level of review and the conclusions it reached were erroneous.

II. Even if the court of appeals were correct in holding that the honorarium ban violates the First Amendment rights of Executive Branch employees to some extent because it prohibits honoraria even where there is no demonstrable connection to federal employment, the court's remedy was overbroad. The court struck down the honorarium ban with respect to all payments to Executive Branch employees, even though the court conceded that the ban could constitutionally

be applied when a nexus to federal employment exists. This Court, however, has made clear that a court should invalidate no more of an unconstitutional law than is necessary. In this case, that principle would require that the honorarium ban be invalidated only to the extent that the government fails to show a nexus to federal employment, based on either the character of the speech or the identity of the payor. Such a remedy would afford full relief to the plaintiffs for the conduct found to be constitutionally protected, while leaving the government free to enforce the ban against honoraria where such a nexus can be established.

ARGUMENT

THE COURT OF APPEALS ERRED IN FACIALLY INVALIDATING THE HONORARIUM BAN

I. THE HONORARIUM BAN DOES NOT VIOLATE THE FIRST AMENDMENT

Regulations that impinge on the speech of government employees are judged under a First Amendment test that requires a court to weigh "the interests of the [employee], as a citizen, in commenting upon matters of public concern" against "the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); see *Connick v. Myers*, 461 U.S. 138, 142 (1983). This test permits the government to impose restrictions on expressive activity by public employees that would be unconstitutional in other settings. *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam). The use

of such a balancing test reflects the recognition that the government, when it acts as an employer, "has far broader powers than does the government as sovereign," because of "the nature of the government's mission as employer." *Waters v. Churchill*, No. 92-1450 (May 31, 1994), slip op. 9, 12 (plurality opinion).

Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.

Id. at 12 (plurality opinion).

To give sufficient latitude to government officials to operate the machinery of government effectively, the Court has "consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." *Waters v. Churchill*, *supra*, slip op. 10 (plurality opinion). Congress may thus impose restraints on employees, without violating the First Amendment, as long as the conduct in question may be "reasonably deemed by Congress to interfere with the efficiency of the public service." *United Public Workers v. Mitchell*, 330 U.S. 75, 101 (1947). Taking into account the character of the restriction imposed by the honorarium ban and the nature and magnitude of the government interests that support it, the ban is constitutional.

A. The Expressive Interests Of Employees Are Minimally Impaired By The Honorarium Ban

The initial step in evaluating the honorarium ban under the First Amendment is to consider its impact on employee expression. Section 501(b) does not prohibit or punish any speech, or discriminate based on subject or viewpoint. Rather, it prohibits only the receipt of money or other compensation for speech by those who have accepted the responsibility of federal employment (and who are paid for doing so). The First Amendment is implicated, therefore, only to the extent that speakers will be less willing to engage in expressive activity because they cannot supplement their federal salaries by receiving honoraria. While removing a financial incentive to engage in expression does trigger First Amendment concern, see *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991), the character of the restriction in Section 501(b) is far less onerous than a ban on expression, and the restriction consequently has less weight in the *Pickering* balance.¹⁷

¹⁷ This Court's previous cases considering First Amendment protection for employee speech (*e.g.*, *Pickering*, *Connick*, *Waters*) have all involved direct sanctions placed on speech (such as termination) for statements with particular content; none has involved the lesser restraint of barring payment for speech. The court of appeals acknowledged the reduced weight of the employees' interest in this case. Pet. App. 5a (the "financial burden on speech" in this case creates a "First Amendment interest" that is "somewhat less weighty than under a flat ban").

In cases involving sanctions placed on employee speech because of its content, the Court has declined to accord First Amendment protection to speech that is entirely on matters of private, rather than public, concern. See *Waters*, *supra*,

Indeed, not only does the statute leave employees completely free to speak on any topic, but under Section 501(b)'s implementing regulations, the ban leaves room for a variety of forms of compensated expression deemed not to implicate Congress's concern about the actuality or appearance of impropriety. Employees thus are not barred from receiving compensation for teaching courses involving multiple presentations at accredited programs or institutions, 5 C.F.R. 2636.203(a)(8) and (9); for engaging in "performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display," 5 C.F.R. 2636.203(b); for reciting "scripted material, as for a live or recorded theatrical production," 5 C.F.R. 2636.203(c); or for writing a "book or a chapter of a book" or "works of fiction, poetry, lyrics, or script," 5 C.F.R. 2636.203(d). Nor does the honorarium ban preclude reimbursement for many of the usual and customary expenses incurred in producing writings, or making speeches or appearances.¹⁸ 5 C.F.R. 2636.203(a)(4) and (5).

slip op. 11. That distinction does not appear to be important under the honorarium ban (which does not focus on the specific content of employee speech), and we assume that respondents' speech has some First Amendment protection whether or not it is on a matter of public concern.

¹⁸ See *National Treasury Employees Union v. United States*, 927 F.2d 1253, 1255 (D.C. Cir. 1991) ("The Act and the OGE regulations expressly exclude 'actual and necessary travel expenses' from the definition of an honorarium. * * * The regulations also exclude from the honoraria ban '[a]ctual expenses in the nature of typing, editing and reproduction costs,' and '[m]eals or other incidents of attendance, such as waiver of attendance fees or course materials furnished as

The honorarium ban prevents the receipt of compensation for individual appearances, speeches, and articles. Some federal employees will undoubtedly choose not to engage in one or more of those activities because they cannot be paid for doing so. That effect on the employees cannot be considered a severe burden. The employees covered by the honorarium ban are on the federal payroll and are therefore not likely in most cases to be financially dependent on outside earnings from expressive activity. And "to the extent that [employees] may be financially dependent on honoraria, the weight of the government interest in avoiding the appearance of impropriety or corruption [from the receipt of those payments] is greatly bolstered." Pet. App. 34a (Sentelle, J., dissenting).

The restriction on the receipt of honoraria thus places, at most, a relatively modest burden on employee speech. Even when the government directly punishes employee speech (by, for example, terminating the employee's employment), the government is not required to show that its action is "narrowly tailored to [serve] a compelling government interest." See *Waters v. Churchill*, *supra*, slip op. 12 (plurality opinion). When the only restriction imposed is a content-neutral one on the receipt of extracurricular income, the burden of justification on the government is not an especially heavy one.

B. The Government Has Significant Interests In Banning The Receipt Of Honoraria

The honorarium ban is supported by several significant government interests. First, the ban on this part of the event at which an appearance or speech is made.' Fairly read, these provisions encompass all of the necessary expenses that the [employees] incur.") (citations omitted).

form of outside income promotes the integrity and appearance of integrity of the federal workforce. Second, the ban serves as a prophylactic measure that resists attempts at evasion. Third, the ban serves goals of administrative efficiency. Those interests readily justify Section 501(b)'s restriction on the ability of government employees to receive income from speech-related activity.

1. Congress has a compelling interest in preventing actual or apparent impropriety by government employees. The citizenry must have confidence that the personnel responsible for the public's business are not subject to improper influence by private special interests. "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is * * * critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (per curiam), quoting *CSC v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973); see also *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978); *Ex parte Curtis*, 106 U.S. 371, 373 (1882). Accordingly, it is consistent with the First Amendment for Congress to take strong measures to protect the integrity and the appearance of integrity of the federal workforce, so long as the behavior it seeks to regulate may be "reasonably deemed by Congress to interfere with the efficiency of the public service." *United Public Workers v. Mitchell*, 330 U.S. at 101 (upholding the Hatch Act); *CSC v. National Ass'n of Letter Carriers*, 413 U.S. at 564-567 (same); *Brown v. Glines*, 444 U.S. 348, 356 n.13 (1980).

The payment of money to federal government employees for the activities covered by the honorarium

ban can involve actual corruption; more importantly, it can readily convey an appearance to the public that influential access to government officials can be purchased by outside interest groups. Members of the public may have the impression that when a government employee is paid for his articles or speeches—even on topics ostensibly unrelated to the employee's duties—the receipt of the payment constitutes an abuse of government authority or a means for private interests to influence official action. Such a belief seriously undermines citizens' confidence in government. Honoraria had long been subject to congressional regulation precisely because of the ease with which officials may engage in ostensibly legitimate activities—giving a speech, writing an article, or making an appearance—when in fact little or no real effort was required on the official's part, and the payment was made principally because of the official's status. While other means of channeling money to officials with the goal of buying influence could pose similar risks, honoraria had emerged as a widespread practice that raised special concerns.

Congress experimented with various financial limitations and caps on honoraria, but it ultimately received the views of two distinguished commissions that such limitations were inadequate. See pages 2-5, *supra*. The Wilkey Commission, in reporting on federal ethics reform, found "no justification for perpetuating the current system of honoraria." *Wilkey Commission Report* at 35 (J.A. 253). The Commission explained that "[h]onoraria paid to officials can be a camouflage for efforts by individuals or entities to gain the officials' favor." *Ibid*. And the Quadrennial Commission endorsed the testimony of present and former congressional leaders and citizens' organi-

zations that the "potential for impropriety in the present rules governing honoraria [is] so high that the practice of receiving honoraria should be eliminated." *Quadrennial Commission Report* at 24 (J.A. 233). While both commissions discussed past abuses of the practice of receiving honoraria with reference to "payments for public appearances to deliver a talk or engage in a colloquy at the invitation of some non-governmental group," the commissions also agreed that a broader statutory definition of honoraria was required, in order to close "present and potential loopholes." *Wilkey Commission Report* at 35, 36 (J.A. 253, 254); *Quadrennial Commission Report* at 24 (J.A. 232, 234).

2. The second interest supporting a broad ban on honoraria is the interest in avoiding the risk that a narrower limitation could be evaded. While some forms of compensated speech by federal employees, before some audiences, may seem sufficiently unrelated to federal employment as to raise no concern, apparently innocuous payments could be made for improper purposes. Indeed, the Wilkey Commission made this exact point: "To curtail the risk that individuals will find a way to circumvent these restrictions, the bar on honoraria necessarily needs to extend both to activities related to an individual's official duties and to other activities." *Wilkey Commission Report* at 36 (J.A. 254).

3. Finally, the government has an interest in avoiding the administrative difficulties that would attach to any rule requiring a substantial number of case-by-case judgments about the appropriateness of particular honoraria. "The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate in-

terest when it acts as sovereign to a significant one when it acts as employer." *Waters v. Churchill*, *supra*, slip op. 12 (plurality opinion). While efficiency concerns would not ordinarily justify limitations on the First Amendment rights of "the public at large[,] * * * where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate." *Id.* at 12-13 (plurality opinion).

Officials might often encounter significant difficulty in determining whether an appearance of impropriety is threatened by particular individual honoraria payments, and the administrative costs of such particularized review could be substantial. Congress would be required either (1) to staff a centralized federal ethics office with the capacity to pass on the proposed appearances, speeches, or articles of the entire federal workforce, or (2) to delegate to officials in different agencies the task of reviewing individual honoraria payments to determine whether a prohibited relationship to federal employment exists. The first approach might not only be expensive and inefficient, it would also run the risk that a central ethics official would be unaware of the details of a particular agency's range of business and might therefore overlook the impropriety or appearance of impropriety raised by particular honoraria. The second approach, involving decentralized administration, could give rise to disparate interpretations of the law, as each agency formed its own view about what constitutes appropriate honoraria payments. A government-wide flat ban on honoraria for individual appearances, speeches, and articles reduces those difficulties.¹⁹

¹⁹ The Ethics Act does provide for designated ethics officials in each covered agency to render advisory opinions to

The difficulties of a more limited ban on honoraria administered by individual agencies are made clear by a 1992 report by the General Accounting Office (*GAO Report*).²⁰ The GAO examined outside activities of federal employees from 1988 to 1990 (before the honorarium ban) that could create an appearance of a conflict of interest. Following a study of ethics enforcement by 11 agencies, the GAO found that the most commonly approved outside activities were speaking and consulting. Even though standards were in place intended to screen out activities that raised conflicts of interest or that would appear to do so, some agencies exhibited "overly permissive policies and practices." *GAO Report* at 9. The GAO also found that OGE was unable to ensure that the rules were enforced effectively and uniformly. *Id.* at 2, 12-13. The GAO concluded that some agencies had thereby "approved activities that

employees interpreting the honorarium ban as applied to particular facts. 5 U.S.C. App. 504(b) (Supp. IV 1992). The issue that is determined in such advisory opinions, however, is not whether the particular content of an employee's individual appearance, speech, or article, or the payor of the employee's fee, raises concerns about actual or apparent impropriety. Rather, it is whether the categorical type of expression in question is covered by the honorarium ban and its implementing regulations. That task is a far more manageable one. So too is the task of applying the more limited scope of the honorarium ban that Congress applied to a "series" of appearances, speeches, or articles. See note 26, *infra*, and accompanying text.

²⁰ See GAO Report to the Chairman, Subcomm. on Federal Services, Post Office and Civil Service of the Senate Comm. on Governmental Affairs, *Employee Conduct Standards: Some Outside Activities Present Conflict-of-Interest Issues* (Feb. 1992), reprinted at Common Cause Amicus Br. App. A (filed Mar. 24, 1994).

were questionable as to the appropriateness of accepting compensation" from non-governmental sources. *Id.* at 9. While the GAO Report was not before Congress when it enacted Section 501(b), its findings give credence to Congress's decision to avoid the risk that patchwork enforcement of a limited honorarium ban might produce some of the very appearances of impropriety that Section 501(b) sought to overcome.

In sum, the prohibition on the receipt of honoraria—regardless of the content of an individual appearance, speech, or article, and regardless of the identity of the person paying the fee to the federal employee—further important government interests that would be compromised were the ban less comprehensive. In the *Pickering* balance, those interests outweigh the limited financial burden placed on federal employees and make the ban a reasonable one, consistent with the requirements of the First Amendment.

C. The Court Of Appeals Erred In Analyzing The Constitutionality Of The Honorarium Ban

In invalidating the honorarium ban, the court of appeals held that the government has an interest in regulating honoraria payments only if a "nexus" exists between the employee's expression and either the nature of his employment or the identity of the payor. Pet. App. 9a. The court then found that restriction of honoraria payments, when such a nexus does not exist, burdens speech without an adequate justification. That conclusion rests on two interrelated analytical errors. First, the court erred by disagreeing with Congress about the kinds of harms that could be deemed to arise from the receipt of honoraria, even when no nexus to employment can

be identified. Second, the court erred by demanding concrete evidence of abuses under the prior administrative scheme in order for Congress to enact a broad prophylactic ban.²¹

1. In striking down the honorarium ban, the court of appeals recognized that "the government has a strong interest in protecting the integrity and efficiency of public service and in avoiding even the appearance of impropriety created by abuse of the practice of receiving honoraria." Pet. App. 6a. The court further noted that it could "safely assume * * * that the interest in avoiding the appearance of impropriety is strong enough to outweigh government employees' interest in engaging in speech for compensa-

²¹ The court of appeals engaged in an extensive analysis of the precise degree of "tailoring" that is required of a government regulation of the speech of public employees. Pet. App. 6a-8a. This Court's decisions, however, have never articulated an independent "narrow tailoring" requirement applicable to regulations of employee speech, and it would be unwise to apply in this context the narrow tailoring test designed to judge regulations of speech of the public at large. "The breadth * * * of the governmental restriction is of course relevant to the *Pickering* analysis," because "[w]hen the government burdens substantially more speech than 'required' by its asserted interest, then its asserted interest might not outweigh that greater burden." Pet. App. 103a (Silberman, J., dissenting from the denial of rehearing en banc). But a rigid "narrow tailoring" requirement is inappropriate under *Pickering*, because the degree of tailoring that is required will vary depending on the nature of the burden on employees and the strength of the government interests at stake. Here, for example, a more lenient degree of tailoring should be demanded, since the only burden on employees is a restriction on outside income derived from speech, and the government interest in strengthening citizen confidence in the integrity of the federal workforce is a compelling one.

tion where the compensation creates such an appearance." *Ibid.* The court concluded, however, that the practice of receiving honoraria poses problems that justify a ban only when there is a "nexus between the employee's job and either the subject matter of the expression or the character of the payor"; only then is there "the sort of impropriety or appearance of impropriety at which the statute is evidently aimed." *Id.* at 9a.

Congress, however, could have reasonably deemed honoraria to pose a threat to the public's perception of the integrity of the federal workforce, whether or not a specific nexus can be shown. *United Public Workers v. Mitchell*, 330 U.S. at 101. The public is not likely to be aware of the full range of responsibilities of a particular employee, or whether the payor of the honorarium has a specific interest in a matter pending before the employee's agency. Virtually any payment for employee speech could therefore trigger citizen concern. The interest in reducing suspicion about the cause or effect of a particular honorarium supports a flat ban, with no grey areas.

While it may be that some lower-echelon employees have such modest responsibilities that the public would not ordinarily assume that an honorarium for unrelated speech involves the possibility of impropriety, the question is necessarily one of degree. Even the court of appeals seemed willing to acknowledge that the receipt of honoraria by a GS-7 "tax examining assistant" (J.A. 67) could stimulate citizen concern, "[i]n view of the universality of citizens' subjection to the Internal Revenue Service." Pet. App. 10a. Yet many career federal employees wield extensive authority over citizens in particular settings.

For example, employees in law enforcement agencies, inspectors of agricultural goods, bank examiners, and procurement officials in all departments have significant control over matters of importance to citizens. Opinions may differ about precisely which employees must be subject to the most rigorous ethical rules in order to prevent issues of apparent impropriety from surfacing. In these circumstances, Congress elected to close potential loopholes and to impose a uniform set of rules. The court of appeals erred by substituting its judgment for Congress's on this issue.²²

2. In *United Public Workers v. Mitchell*, *supra*, this Court rejected a claim, analogous to that accepted by the court of appeals, that Congress had swept too broadly in covering all federal employees under the Hatch Act. In holding that Congress could seek to eradicate the problems caused by partisan political activity in the federal service, the Court relied on Congress's appraisal of the potential dangers. Thus, the Court rejected the argument that

²² In *Buckley v. Valeo*, 424 U.S. 1, 82 (1976) (per curiam), this Court upheld federal campaign laws against an overbreadth challenge based on the theory that the "monetary thresholds in the record-keeping and reporting provisions lack a substantial nexus with the claimed governmental interests, for the amounts involved are too low even to attract the attention of the candidate, much less have a corrupting influence." While recognizing that the "thresholds are indeed low," *id.* at 83, the Court held that "[t]he line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion." *Ibid.* Because that rationale satisfied the "strict scrutiny" applied to fully protected political speech in *Buckley*, 424 U.S. at 75, it is also sufficient in the context of the reduced First Amendment level of scrutiny applicable here.

a lower-rung employee, such as a roller in the mint, could not be covered by the ban on partisan political activity, because Congress "may have concluded" that advancement in government service could come to depend on participating in politics and "may have thought" that government employees could usefully be conscripted into a political machine. 330 U.S. at 101. And the Court rejected the claim that "industrial" rather than "administrative" employees could not be covered by the Hatch Act, viewing such distinctions in types of employees to be "differences in detail" that were for Congress to determine. *Id.* at 102. In *CSC v. National Ass'n of Letter Carriers*, 413 U.S. at 564-567, the Court, with the *Pickering* balancing test in mind, reaffirmed its conclusion that the broad prophylactic approach of the Hatch Act does not violate the First Amendment. The analysis in the Hatch Act cases cannot be squared with the court of appeals' holding here.

Section 501(b) is a far milder prophylactic rule than the rule upheld in *Mitchell* and *CSC*. The Hatch Act barred most federal employees from taking "any active part in political management or in political campaigns." *Mitchell*, 330 U.S. at 78. The Act thus sharply limited political rights that lie at the heart of the First Amendment. See *Connick v. Myers*, 461 U.S. at 145. This case, in contrast, does not involve any direct limitation on political speech, and does not prohibit any speech or activity from taking place. Rather, it prohibits only the receipt of financial rewards above and beyond the expenses incurred by the employee. If anything, therefore, greater deference is owed to Congress's broad ban on honoraria in this case than to its ban of partisan politics in the Hatch Act.

The court of appeals dismissed the Hatch Act cases on the basis that the Hatch Act addressed a threat of subtle pressure to engage in partisan political activity, such that "it is in the nature of the evil to be averted that it will be concealed." Pet. App. 13a. In that setting, the court believed that no concrete examples of abuse would be expected to surface and that this justified relieving Congress of the burden to point to a record of prior abuses. *Ibid.* For three reasons, the court of appeals erred in refusing to apply the test articulated in *Mitchell*.

First, this Court has never said that *Mitchell's* test is limited to legislative remedies for subtle forms of abuse. The Court gave Congress a freer hand to regulate the speech of employees than it has to regulate the speech of the citizenry at large because of the special interests that the government has as employer. *Mitchell's* deferential approach was not fashioned specifically because of a belief that the problem of coercion of employees to engage in partisan politics could easily be concealed.

Second, whenever Congress is imposing a regulatory net in part to prevent corruption, as in this case, it is likely that prior corrupt activity would have been concealed and that its specific effects may be hard to discern. If it is difficult to determine whether employees have been covertly influenced to engage in partisan politics, it is also difficult to determine the extent to which public confidence in government may be eroded because of actual or perceived impropriety in the receipt of honoraria. In either case, the primary body to make the relevant judgment is Congress.

Third, Congress did have before it evidence of significant abuse of honoraria—in the Legislative

Branch. Congress was entitled to extrapolate from its own experience and to conclude that comparable abuses could also occur in the other branches of government. And, while public perception of abuses of honoraria may be more likely at the upper reaches of the Executive Branch, Congress was within its discretion in applying the honorarium ban to all employees where the potential for abuse exists—just as Congress did in the Hatch Act, see *Mitchell*, 330 U.S. at 101, and just as it has done with a panoply of anti-corruption laws that are applicable to all Executive Branch employees, from clerks to cabinet officers.²³ See also *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 661 (1990).

As a plurality of the Court noted in *Waters v. Churchill*, *supra*, slip op. 10, in evaluating "government predictions of harm used to justify restrictions of employee speech," the Court has not insisted on "tangible, present interference with the agency's operation." Rather, the "danger[s]" found sufficient by the Court have been "mostly speculative." *Ibid.* Indeed, "[o]ne could make a respectable argument that political activity by government employees is generally not harmful," *ibid.*, but this Court has nevertheless upheld Congress's broad Hatch Act prohibitions. There is no reason for a different conclusion here with respect to the honorarium ban.²⁴

²³ See, e.g., 18 U.S.C. 201(b) and (c) (prohibiting solicitation or receipt of bribes or illegal gratuities); 18 U.S.C. 209 (prohibiting receipt of compensation for government service or a supplementation of salary from a private party).

²⁴ Congress remains free "to give additional protections to its employees beyond what is mandated by the First Amendment, out of respect for the values underlying the First

3. Rather than applying the deferential approach reflected in this Court's cases dealing with the First Amendment rights of public employees, the court of appeals took its guidance from cases construing the First Amendment in the context of fully protected private speech. In rejecting the claim that the honorarium ban is a legitimate prophylactic measure, the court of appeals stated that "a mere 'hypothetical possibility' of a corrupt 'exchange of political favors' is not enough" to support the law; actual evidence of abuse is required. Pet. App. 12a. In support of that test, the court of appeals quoted from *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 498 (1985), and cited *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978). Pet. App. 12a-13a. Both of those cases, however, examined fully protected political speech by private persons.²⁵ They did not involve speech by govern-

Amendment, values central to our social order as well as our legal system." *Waters v. Churchill*, *supra*, slip op. 11-12. Congress has accordingly recently relaxed some of the restrictions formerly imposed by the Hatch Act. See Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001. Somewhat similarly, Congress recently enacted a limited exception to the honorarium ban for certain scholarly writings by students and most teachers at military academies. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 542, 106 Stat. 2413-2414 (1992).

²⁵ *FEC v. National Conservative Political Action Committee*, 470 U.S. at 491, considered a provision making it a crime for an independent political action committee to spend more than \$1,000 in support of a presidential candidate who accepted federal funding. The Court made clear that "the expenditures at issue in this case produce speech at the core of the First Amendment," and are "entitled to full First Amendment protection." *Id.* at 493, 496. *First National Bank of*

ment employees, the regulation of which is judged under the more lenient *Pickering* balancing test. In the latter context Congress's appraisal of dangers to the efficiency and integrity of the federal workforce is given far greater judicial deference, even if the courts may deem those dangers to be "speculative." *Waters v. Churchill*, *supra*, slip op. 10 (plurality opinion).

4. Because it applied an incorrect legal test, the court of appeals improperly found fault with Section 501(b), based on the absence of concrete evidence of administrative problems associated with prior experience with a nexus test. Pet. App. 11a. None of the specific ways in which the court demanded evidence of enforcement or administrative costs, however, forms a permissible basis for invalidating Section 501(b).

The court first observed that the government did not identify "any serious enforcement or line-drawing costs associated" with the pre-Section 501(b) scheme for regulating honoraria, which (as reflected in the government's interpretation of conflict-of-interest statutes, rules, and executive orders) involved a form of nexus test. Pet. App. 11a; see J.A. 179. As discussed above, however, Congress was not required to wait until harms actually materialized in the Executive and Judicial Branches before eliminating a practice that had already caused serious con-

Boston v. Bellotti, 435 U.S. at 767, involved a state criminal law prohibiting corporations from making expenditures to influence referenda. The Court described the prohibited speech as lying "at the heart of the First Amendment's protection," and subjected the prohibition to strict scrutiny. *Id.* at 776, 786.

cern in the Legislative Branch. Even if the practice of accepting honoraria had not yet grown to such proportions in the Executive or Judicial Branches as to impair the reputation for integrity of those institutions, Congress, based on its own experience, could seek to prevent such damage from occurring.

In considering ethics reform legislation, individual Members of Congress concurred in the conclusion that the public had come to think that "the rise in congressional speaking fees is[] at best providing those special interests which can afford honoraria payments unfair access to Government officials and, at worst, institutionalizing a thinly veiled system of legalized influence buying." 135 Cong. Rec. H8766 (daily ed. Nov. 16, 1989) (remarks of Rep. Wolpe). As Senator Humphrey explained:

This is a hardnosed town. People do not do nice things for you, just to be nice. When someone pays \$1,000 just for a speech, it is not purely on the basis of altruistic motives. They are hoping, at the very least, the Senator will be somewhat more disposed toward their point of view, should some matter come up in the future which concerns them. That is what is wrong with honoraria.

Id. at S15952 (daily ed. Nov. 17, 1989). Even if most honoraria did not involve conflicts of interest, Senator Dole agreed with his colleagues that "we had better err on the side of caution" and that "to be on the safe side we should eliminate honoraria." *Id.* at S15948. That judgment, though articulated in the context of the Legislative Branch, could be thought to hold true for the other branches as well.

Second, the court erred in considering Section 501(b) itself to contain evidence that Congress

deems a nexus test to be sufficient to protect federal interests with respect to the receipt of honoraria. The court noted that Section 501(b) bans honoraria for a "series of appearances, speeches, or articles" only when "the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government." 5 U.S.C. App. 505(3) (Supp. IV 1992) (emphasis added). Congress's adoption of a nexus approach when a "series" is at issue, however, did not require it to extend the same approach to all honoraria payments. Rather than suggesting that Congress "regards [the nexus] lines [applicable to a series] as entirely workable" in all contexts, as the court of appeals suggested, Pet. App. 12a, the special rule for a "series" of appearances, speeches, or articles can be explained by the different administrative and enforcement issues that arise in that context.²⁶ Indeed,

²⁶ Several factors distinguish honoraria for a series of appearances, speeches, or articles from individual instances of expression for pay. First, Congress "might reasonably have concluded" that repeated paid appearances before a particular group are "likely to be more open and more visible to the public (or the public's watchdogs) than * * * a one-time payment for a single appearance," and that "corruption is less likely under such circumstances." Pet. App. 85a-86a (Williams, J., concurring in the denial of rehearing and rehearing en banc). Second, Congress may also have found that the larger volume of material likely to be involved in a "series" facilitates the judgment about whether a prohibited nexus exists. Third, because it is likely that relatively few employees engage in a "series" of paid appearances, speeches, or articles, requiring case-by-case review for nexus issues involving a series presents a far more manageable administrative task than if officials were required to review *all* individual instances of compensated speech by federal employees.

the Wilkey Commission itself had suggested that ongoing relationships (characteristic of a series) raise lesser concerns than single-shot appearances, noting that "as we conceive of it, the bar on receipt of honoraria would not prohibit payment for continuing activities such as teaching academic, for-credit, courses." *Wilkey Commission Report* at 36 (J.A. 254); see also *Quadrennial Commission Report* at 30 (J.A. 242).

The court of appeals relied on *Boos v. Barry*, 485 U.S. 312, 324-329 (1988), in comparing the different components of Section 501(b) to each other to determine whether the honorarium ban for individual appearances, speeches, and articles is "narrowly tailored." Pet. App. 11a. *Boos*, however, compared a narrow restriction of speech recently enacted by Congress with a broad one enacted many years earlier, and concluded that in light of the more recent provisions the older law could not be deemed narrowly tailored to serve the governmental interests at stake. A comparison of that nature is not justified when Congress enacts roughly contemporaneous provisions intended to form complimentary rules in the same statutory scheme. The relevant baseline for evaluating the need for Section 501(b) is found in Congress's prior, limited, and ultimately unsuccessful effort to regulate honoraria. "[A] comparison of the honorarium ban to prior ethics laws unmistakably reveals a congressional determination that only a broad, government-wide ban on honoraria is sufficient to protect against the appearances of impropriety or corruption accepting honoraria creates." Pet. App. 43a (Sentelle, J., dissenting). Such "careful legislative adjustment" of the honoraria laws "in a cautious advance, step by step," to reflect Congress's evolving

sense that a flat ban was required "warrants considerable deference." *FEC v. National Right To Work Committee*, 459 U.S. 197, 209 (1982) (internal quotation marks omitted).

Under a standard that gives proper deference to Congress's appraisal of the risks of honoraria, Section 501(b) is constitutional. There may be differences of opinion about whether, as a policy matter, the honorarium ban reflects an excessive degree of caution. Some may have preferred that Congress had erred on the side of permitting honoraria when no apparent nexus is present, even if the price were to allow some troublesome payments to slip through the cracks. But Congress is entitled to considerable leeway in protecting the appearance of integrity of the federal workforce—particularly when the issue is not whether employees may enjoy free speech, but whether they may engage in paid speech.

II. THE COURT OF APPEALS' REMEDY IS TOO BROAD BECAUSE IT EXCEEDS THE SCOPE OF THE VIOLATION FOUND

Even if the court of appeals were correct in concluding that Section 501(b) has some unconstitutional applications, the court's remedy far exceeds the scope of the purported violation. The court acknowledged that "for some of § 501(b)'s applications—perhaps many of them—the *Pickering* balance supports its constitutionality." Pet. App. 6a. Yet the court of appeals invalidated Section 501(b) in *all* its applications to Executive Branch employees—even where the government could readily demonstrate the existence of "some sort of nexus between the employee's job and either the subject matter of the expression or the character of the payor." *Id.* at 9a.

The overbroad relief ordered by the court of appeals is unjustified.²⁷

1. The principle that a statute should not be invalidated to a greater extent than is necessary finds expression in several lines of this Court's cases. First, under traditional principles of severability, "[w]henver an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (internal quotation marks omitted); *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion); *INS v. Chadha*, 462 U.S. 919, 934 (1983); *Buckley v. Valeo*, 424 U.S. at 108; see *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982) (when a "federal statute * * * is impermissibly overbroad, it nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated"). The Court has explained that severance of the unconstitutional provision is required "unless the statute created in its absence is legislation that Congress would not have enacted." *Alaska Airlines, Inc.*, 480 U.S. at 685.

²⁷ The breadth of the court of appeals' judgment is underscored by the court's grant of relief in favor of *all* Executive Branch employees, even though the class consisted only of Executive Branch employees below grade GS-16. J.A. 124-125. Respondents did not argue that the honorarium ban was unconstitutional as to such senior executive officials, see Resp. C.A. Br. 36 n.21, and even the court of appeals may have reached a different outcome on the *Pickering* balance as to such officials, cf. Pet. App. 13a, yet its comprehensive ruling foreclosed that issue.

Second, the Court's decisions manifest a strong preference for addressing as-applied constitutional challenges to statutory provisions before adjudicating facial challenges that rely on overbreadth theory. See *Renne v. Geary*, 501 U.S. 312, 323-324 (1991); *Board of Trustees v. Fox*, 492 U.S. 469, 484-485 (1989). When a court proceeds in the recommended sequence and finds that a provision is unconstitutional as applied to the particular conduct alleged by the plaintiffs, it is normally unnecessary, and generally imprudent, to proceed to determine whether the provision would also be facially unconstitutional as applied to other parties and other conduct. *Renne*, 501 U.S. at 324; *Fox*, 492 U.S. at 485.

Third, overbreadth doctrine itself prohibits facial invalidation of a statute unless "the overbreadth of a statute [is] * * * not only * * * real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); *New York v. Ferber*, 458 U.S. at 769-772; *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502-503 & n.12 (1985). Where, as here, a statute has a concededly broad range of entirely permissible applications, a court should not reach out to strike down the statute on its face, when a narrower form of relief is available.

2. The court of appeals departed from those principles in affirming the district court's judgment. The court of appeals began by correctly noting that it should invalidate no more of Section 501(b) than is necessary to remedy the constitutional flaw it discovered. Pet. App. 14a. The court concluded, however, that it could not leave Section 501(b) in place as to applications in which the government *can* establish a nexus between the honoraria and government

employment, because "[a]rticulation of some appropriate nexus test would seem a purely legislative act." *Ibid.* That analysis is incorrect. The court of appeals itself crafted a "nexus test" as an integral element of its First Amendment inquiry; it held that because there is no required nexus in the statute, the prohibition is not narrowly tailored. *Id.* at 9a-14a. If the nexus concept serves to identify the *unconstitutional* applications of Section 501(b), as the court of appeals held, it also can serve to identify the *constitutional* applications of Section 501(b). The court expressed concern that if it had invalidated the honorarium ban only to the extent that it reaches honoraria where no nexus to employment is present, it would have intruded on Congress's prerogative to craft a specific nexus inquiry. Pet. App. 14a. Interpreting the Constitution to require a nexus to be shown, however, does not intrude on Congress's prerogatives. In addition, the statute itself contains a general nexus test with respect to a "series" of appearances, speeches, and articles, and that test would have readily furnished a suitable line for the court to invoke to implement its constitutional holding.²⁸

²⁸ See 5 U.S.C. App. 505(3) (Supp. IV 1992) (prohibiting honoraria for a series of appearances, speeches, or articles when "the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government"). That test fits well within the court's requirement of a "nexus between the employee's job and either the subject matter of the expression or the character of the payor." Pet. App. 9a. Ironically, the court of appeals invalidated even the portion of the statute governing honoraria for a "series" of appearances, speeches, or articles, even though it is difficult to imagine under the court's own analysis how that provision has any potential unconstitutional application.

The court's essential error was its failure to craft a remedy that responded to the particular constitutional violation it found. A proper remedy, in light of that violation, would have redressed the honorarium ban's unconstitutionality *as applied* to speech lacking a nexus to federal employment.²⁹ This Court's First Amendment cases reflect that more restrained approach. For example, in *United States v. Grace*, 461 U.S. 171 (1983), the plaintiffs engaged in expressive activity on the sidewalk in front of the Supreme Court. Their conduct violated 40 U.S.C. 13k, which prohibited displays designed "to bring into public notice any party, organization, or movement" anywhere in the Supreme Court building or its grounds, defined to include the adjacent public sidewalk. Although the plaintiffs argued that the statute was facially invalid in all its applications, the Court declined to determine

²⁹ The central objection to the honorarium ban voiced in the complaints is that the ban prohibits "federal employees from receiving income from speeches, articles or appearances unrelated to their federal employment." NTEU Second Amended Complaint, ¶ 35 (J.A. 13); see AFGE Complaint, ¶ 20 (J.A. 20). And all of the specific honoraria that the ban was alleged to have improperly prohibited purported to be speech that was unrelated to federal employment. See NTEU Second Amended Complaint, ¶¶ 5, 6 (J.A. 5-6), 14-15 (J.A. 7-8); AFGE Complaint, ¶¶ 12-16 (J.A. 18-20); *Crane et al.* Amended Complaint, ¶¶ 4-12 (J.A. 26-30). But see Pet. App. 10a (noting that "some of the plaintiffs receive payments that might at least raise an eyebrow"). Accordingly, as Judge Silberman noted, "[a]ll that is needed to cure the constitutional infirmity is to relieve the ban on compensation from single speeches whose subject does not relate to the employee's job and when the status of the employee is not implicated." Pet. App. 105a (dissenting from the denial of rehearing en banc).

the validity of Section 13k as applied to the Supreme Court building and its immediate grounds. Rather, even though the statute on its face did not distinguish between public sidewalks and other places such as the interior of the Court, the Court concluded that the provision could not constitutionally "be applied to the public sidewalks" and struck down the statute only to that limited extent. 461 U.S. at 179.

More recently, in *Edenfield v. Fane*, 113 S. Ct. 1792 (1993), the Court considered a state prohibition against in-person solicitation of work by a certified public accountant. Although the ban contained no textual distinction between solicitation of commercial customers and solicitation of nonbusiness customers, the Court held that "as applied to CPA solicitation in the business context, [the State's] prohibition is inconsistent with the free speech guarantees of the First and Fourteenth Amendments." *Id.* at 1796. The Court thus treated "Fane's claim as an as applied challenge to a broad category of commercial solicitation," *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2706 (1993), and saw no need to invalidate applications that might well have been justified under the First Amendment. See also *Brockett v. Spokane Arcades, Inc.*, 472 U.S. at 504 (holding that an obscenity statute was invalid "only insofar as the word 'lust' is to be understood as reaching protected materials"; declining to invalidate constitutionally permissible applications of the term "lust"). Under *Grace*, *Edenfield*, and *Brockett*, facial invalidation of the honorarium ban was inappropriate even if it was not possible to find a "limiting construction" of the statute. Pet. App. 14a. It would have been sufficient to declare the provision unenforceable as to its invalid applications.

This is not a case in which the court was justified in invalidating the entire honorarium ban on overbreadth grounds. Cf. *FEC v. National Conservative Political Action Committee*, 470 U.S. at 501. The honorarium ban has a substantial number of valid applications, and the court made no effort to determine what proportion of its applications might be invalid. See *Fox*, 492 U.S. at 485 (noting that such an inquiry is required in an overbreadth case). The court of appeals stated only that "the ban reaches a lot of compensation that has no nexus to government work" and speculated that "the scope of the invalid applications is large." Pet. App. 10a & n.4. Simultaneously, however, the court acknowledged that "perhaps many" applications of the honorarium ban are constitutional under "the *Pickering* balance," *id.* at 6a, and conceded that the ban "covers payments for speeches and articles that may well create an appearance of impropriety." *Id.* at 10a. Yet "[t]his Court has * * * repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied." *Parker v. Levy*, 417 U.S. 733, 760 (1974).

The purpose of the overbreadth doctrine is to protect against the chill imposed on protected speech by "a sweeping statute, or one incapable of limitation." *New York v. Ferber*, 458 U.S. at 772; *Broadrick v. Oklahoma*, 413 U.S. at 612; *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989) (plurality opinion) ("Overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression."). Overbreadth doctrine is usually invoked to create an exception to the general rule of standing that a person

may assert a violation only of that person's constitutional rights; "the person invoking overbreadth may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him." *Fox*, 492 U.S. at 482-483 (internal quotation marks omitted); *Broadrick v. Oklahoma*, 413 U.S. at 610-612. Here, however, respondents do not assert that facial invalidation of the honorarium ban is necessary to protect against a chilling effect imposed on nonparties. Because the district court certified a class consisting of all federal employees below grade GS-16, it is questionable whether any potential plaintiffs not before the Court would be deterred from engaging in protected speech by the honorarium ban.

Nor is total invalidation of the honorarium ban necessary to relieve a chilling effect on respondents themselves. Respondents' rights would have been adequately protected if the court of appeals had held the ban unconstitutional as applied to honoraria where the government does not show a nexus to employment. Pursuant to the statute, employees desiring to receive honoraria can obtain advisory opinions interpreting the Act from designated ethics officials, and "[a]ny individual to whom such an advisory opinion is rendered * * * who, after the issuance of such advisory opinion, acts in good faith in accordance with its provisions and findings shall not, as a result of such actions, be subject to any sanction" under the honoraria law. 5 U.S.C. App. 504(b) (Supp. IV 1992); see also 5 C.F.R. 2636.103. In light of that procedure, an employee could obtain an advance determination of whether a particular honorarium would have a nexus to federal employment (as the

court thought was required by the First Amendment), without having to risk any penalty or sanction.³⁰

The court, therefore, should have limited its decision to invalidating the application of Section 501(b) to cases in which there is no nexus between the speech for compensation and the employee's federal status, and left the remaining applications in force. There was no basis for invoking any form of "overbreadth" doctrine in this case, with the effect of invalidating clearly constitutional applications of the law. "[W]hatever overbreadth may exist should be cured through case-by-case analysis." *Broadrick v. Oklahoma*, 413 U.S. at 615-616; *Brockett v. Spokane Arcades, Inc.*, 472 U.S. at 503-507.

³⁰ The danger of chill is also reduced by the fact that the statutory remedy for a violation of the honorarium ban is not a criminal penalty; rather, a court may simply order disgorgement of an amount up to the amount of the compensation received or \$10,000, whichever is greater. 5 U.S.C. App. 504(a) (Supp. IV 1992); see *Ferber*, 458 U.S. at 773 (noting that "the penalty to be imposed is relevant in determining whether demonstrable overbreadth is substantial").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

UNITED STATES OF AMERICA, *et al.*,
v. *Petitioners,*

NATIONAL TREASURY EMPLOYEES UNION, *et al.*

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**BRIEF FOR RESPONDENTS,
NATIONAL TREASURY EMPLOYEES UNION, ET AL.**

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QUESTIONS PRESENTED

Section 501(b) of the Ethics in Government Act of 1978, as amended, 5 U.S.C. app. 501(b) (Supp. IV 1992), prohibits the receipt of "anything of value" for any appearance, speech or article by Members of Congress and by officers and employees of the federal government. The questions presented are:

1. Whether a ban on receipt of compensation for expressive activities unrelated to official duties unconstitutionally restricts the First Amendment rights of executive branch employees because it singles out expressive activities for a discriminatory burden and is broader than reasonably necessary to serve a substantial governmental interest.

2. Whether the court of appeals correctly invalidated Section 501(b) as applied to executive branch employees, leaving it to Congress to narrow the ban, rather than attempting to render the statute constitutionally sound by fashioning a nexus standard of its own.

PARTIES TO THE PROCEEDING

National Treasury Employees Union Chapter 143 is a party to this proceeding, in addition to those listed by the United States.

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CONSTITUTION, STATUTES, AND
REGULATIONS INVOLVED

In addition to the constitutional, statutory, and regulatory provisions set forth in the government's brief, respondents cite to an exception to 5 U.S.C. app. 501(b), found in the National Defense Authorization Act for Fiscal Year 1993, 10 U.S.C. 2161 note, which is set forth in the appendix to this brief, App. 1a-3a. Regulations establishing standards of conduct generally applicable to executive branch employees' outside activities, 5 C.F.R. 2635.801-2635.809 (1993 ed.), are set forth in the appendix to the opposition to the petition for a writ of certiorari, Opp. App. 1a-24a.

STATEMENT

A. The Regulatory Background and the Statutory and Regulatory Scheme of the "Honoraria" Ban

This case concerns the constitutionality of Section 501(b) of the Ethics Reform Act of 1989, which prohibits executive branch employees, among others, from accepting compensation for any appearance, speech, or article, even where there is no nexus between the employees' writing and speaking and their governmental duties. The ban—purportedly a measure to promote governmental integrity—singles out expressive activity for financial burden, leaving employees free to accept compensation for other nonwork-related, off-duty activity.

Respondents are career executive branch employees who, prior to the passage of the Act, wrote articles or delivered speeches on nonwork-related topics, on their own time, for compensation. They brought this action to challenge the ban as a violation of their First Amendment rights and the rights of similarly situated career employees. What follows is a description of the regulatory scheme that preceded the statutory ban, a brief overview of the ban's legislative history, and a discussion of the new regime of ethical standards implemented in its wake.

1. Government-wide regulations on ethical standards, as well as supplemental agency regulations, have traditionally encouraged executive branch employees to engage in activities such as teaching, lecturing, and writing, where they do so on their own time and without using government resources. *See, e.g., 5 C.F.R. 735.203(c) (1990 ed.); Joint Appendix (J.A.) 51, 106, 218.* Such activity often enhances employees' professional standing and, in turn, their value to their employing agencies. *J.A. 43, 89, 106, 75, 218.*

Historically, the regulations were structured both to give civil servants freedom to engage in outside personal

and professional activities, including those for remuneration, and to guard against real or perceived conflict with their public responsibilities. Supplemented as necessary by individual agency restrictions, the government-wide regulations prohibited participation only in those outside activities that could create a conflict of interest or the appearance of a conflict. *See, e.g., 5 C.F.R. 735.201 et seq. (1990 ed.); J.A. 90-111, 211-219.* They prohibited executive branch employees from engaging in any activity, paid or unpaid, that was "not compatible with the full and proper discharge" of their governmental duties; from accepting compensation that might create the appearance of a conflict; and from using government equipment or nonpublic information in the course of their activities. *See 5 C.F.R. 735.203-735.206 (1990 ed.).¹*

2. On November 30, 1989, Congress passed the Ethics Reform Act of 1989 (Pub. L. No. 101-194, 103 Stat. 1716) amending the Ethics in Government Act of 1978. The relevant provisions, which took effect January 1, 1991, provided that "[a]n individual may not receive any honorarium while that individual is a Member, officer or employee." 5 U.S.C. app. 501(b).² Although an "honorarium" is generally considered to mean a payment that is made where none is expected,³ Congress de-

¹ These regulations were replaced, effective February 3, 1993, with comprehensive standards of ethical conduct for employees of the executive branch. 5 C.F.R. 2635, *et seq.* (1993 ed.) *See discussion infra* at 7 & n.6, 30 & n.22.

² The prohibition is enforceable through a civil action brought by the Attorney General, who may seek a civil penalty of not more than \$10,000 or the amount of compensation received, whichever is greater. 5 U.S.C. app. 504(a). In addition, an employee who violates the prohibition may be subject to disciplinary or corrective action, up to and including removal. 5 C.F.R. 2636.104(b), *Pet. App. 118a.*

³ *See American Heritage Dictionary, Second College Edition (1985) ("honorarium" commonly connotes payment "for services for which fees are not legally or traditionally required").*

fined the term to include *any* "payment of money or any thing of value for an appearance, speech or article . . . by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative)." 5 U.S.C. app. 505(3) (Supp. I 1989).

The prohibition on acceptance of "honoraria" was originally applicable to all officers and employees of the executive and judicial branches, and to members of the House of Representatives and their staff, but not to Senators and their staff. 5 U.S.C. app. 505(1), (2). By regulation issued by the Office of Government Ethics ("OGE"), officers but not enlisted members of the uniformed services, as defined in 5 U.S.C. 2101(3), are covered by the ban. 5 C.F.R. 2636.102(c), Pet. App. 115a. Except for "special government employees" as defined in 18 U.S.C. 202, and the President and Vice President, all other officers and employees of the executive branch are covered, including civilian employees at the very lowest grades. *Id.*

The prohibitions relating to honoraria and limitations on outside income were coupled with a 25-percent pay increase for members of the House, the judiciary, and senior political appointees within the executive branch. Pub. L. No. 101-194, Title VII, Sec. 703, codified at 5 U.S.C. 5318 note. The Senate (which had elected not to receive the pay increase at that time) and its staff were initially allowed to continue to receive "honoraria."⁴ Pub. L. No. 101-194, Title XI, Sec. 1101, codified at 5 U.S.C. 5305 note. Lower graded executive branch employees did not receive the pay increase but were still prohibited from receiving "honoraria."

⁴ In the Congressional Operations Appropriations Act of 1991, Congress extended both the ban on receipt of honoraria and the accompanying pay increase to Senators and their staff. Pub. L. No. 102-90, Tit. I, Sec. 6(b)(2), 105 Stat. 450, 5 U.S.C. 5318 note.

The Congressional Operations Appropriations Act of 1991 amended Section 505 of the Ethics Reform Act to deal specifically with series of appearances, speeches, or articles. Pub. L. No. 102-90, Tit. III, Sec. 314(b), 105 Stat. 469. Effective January 1, 1992, the definition of "honorarium" reads as follows:

The term "honorarium" means a payment of money or anything of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government) by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative). . . .

5 U.S.C. app. 505(3) (Supp. IV 1992).

3. OGE has issued regulations defining the statutory terms "appearance," "speech," and "article." 5 C.F.R. 2636.203(b), (c), (d), Pet. App. 124a-125a. "Appearance" is broadly defined as attendance at any public or private gathering and "incidental conversation or remarks," but excludes "performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display." *Id.* at 2636.203(b). A "speech" is any "oral presentation," excluding the "recitation of scripted material" or a "performance," and further excluding "the conduct of worship services or religious ceremonies." *Id.* at 2636.203(c).⁵ Finally, an "article" is a writing "other than a book or a chapter of a book," published in a "journal, newspaper, magazine or similar collection of writings," except for "works of fiction, poetry, lyrics, or script." *Id.* at 2636.203(d).

⁵ However, the definition of speech does include "a talk on theology given to other ministers, . . . offering a prayer at the opening of a convention or . . . delivering a sermon during a worship service conducted by another minister." 5 C.F.R. 2636.203(c), example 3; Pet. App. 125a.

OGE has also promulgated a regulatory definition of "honorarium." 5 C.F.R. 2636.203(a), Pet. App. 120a. In addition to excluding "actual and necessary travel expenses" from "honorarium," as provided by statute, OGE has created a regulatory exception for "actual expenses in the nature of typing, editing and reproduction costs." *Id.* at 2636.203(a)(5). It has also exempted compensation received under a "usual employee compensation plan" for services "on a continuing basis" or for the teaching of a course "with multiple presentations" as part of certain kinds of programs or the curriculum of "an institution of higher education." *Id.* at 2636.203(7)-(9).

OGE added yet a further exception in response to Congress' 1991 amendment of the definition of "honorarium," which, as noted *supra*, changed the definition to specifically include payments for a series of appearances, speeches, or articles, where related to the individual's official duties. Reasoning that the amendment created an exception for compensation for a series of appearances, speeches, or articles that were *not* related to official duties (57 Fed. Reg. 601 (January 8, 1992)), OGE amended 5 C.F.R. 2636 to allow

[p]ayment for a series of three or more different but related appearances, speeches or articles, provided that the subject matter is not directly related to the employee's official duties and that the payment is not made because of the employee's status with the Government.

Id. at 2636.203(a)(13), Pet. App. 122a.

In short, the statutory ban resulted in significant changes to the scheme of ethical standards to which career employees are subject. For the first time, the government-wide regulations included highly complex restrictions that were applicable only to employees' off-duty writing and speaking. Receipt of compensation for cov-

ered forms of free-lance writing and speaking became subject to a flat ban. At the same time, government-wide ethical standards left career employees free to accept compensation for any form of off-duty activity *other than* making appearances, giving speeches, or writing articles, where the activity did not conflict with their official duties (5 C.F.R. 2635.802) or otherwise involve misuse of their governmental position. *Id.* at 2635.701, *et seq.*⁶

B. The Instant Challenge and the Impact of the "Honoraria" Ban on Respondents

Shortly before the effective date of Section 501(b), two federal employee unions and several individual career executive branch employees commenced actions (which were later consolidated) in the United States District Court for the District of Columbia, challenging the constitutionality of the ban on receipt of compensation for expressive activity and seeking injunctive relief. The National Treasury Employees Union was certified as the class representative of all executive branch employees below the grade of GS-16 who would receive "honoraria" but for the prohibitions of Section 501(b). J.A. 124-25.

The individual respondents are full-time career executive branch employees, all but one of whom are below the grade of GS-16,⁷ who had written or spoken for valuable consideration on their own time and using their own resources prior to the effective date of the Act. Pet. App. 60a-61a & n.1. They include, among others, Peter G. Crane, a Nuclear Regulatory Commission attorney who was working on articles on Russian history; Charles E. Fager, a mailhandler who wrote and spoke about the

⁶ The latter ethical standard prohibits use of public office by career employees for private gain and use of nonpublic information, government property, or official time in the conduct of the outside activity. *Id.* at 2635.702-705.

⁷ Respondent Crane is a GS-16 attorney with the Nuclear Regulatory Commission. J.A. 207.

Quaker religion; William H. Feyer, a Department of Labor attorney who delivered lectures on Judaism; Jan Adams Grant, an Internal Revenue Service employee who wrote articles on environmental topics and spoke on earthquake preparedness; and George J. Jackson, a microbiologist with the Food and Drug Administration who wrote about the art of dance for magazines and newspapers. J.A. 38-41, 47-48, 49-51, 67-71, 77-79.

Because respondents' free-lance writing and speaking created neither a real nor apparent conflict with their federal jobs, they engaged in those activities consistent with the laws and regulations then in force. Following the enactment of the ban, however, respondents were forced to curtail, and in some cases to cease, their writing and speaking activity. J.A. 45-46, 64-66, 88, 132-35, 183-85.

Many of the respondent writers and speakers simply could not afford to continue without receiving compensation for their work because they incur substantial capital expenses as well as research and travel expenses that are not recoverable under the ban.⁸ Many also lost incentive to engage in their writing or speaking because the

⁸ Respondents' non-recoverable capital expenses include the purchase of word processing equipment and software, research tools, professional books, subscriptions to publications, and specialized equipment; maintenance of professional memberships; and maintenance of home offices. J.A. 132, 45-46, 56. They also often have expenses over and above those recoverable under OGE regulations, in particular those not directly attributable to a particular article or speech. J.A. 45-46, 65, 88, 174-75.

In addition, because the employees could be spending their available nonwork time engaged in other activity for which they could lawfully accept compensation, time spent in writing or speaking represents lost income. The ban has tax consequences as well: employees may deduct their related expenses on their tax returns only if they are "business expenses." The effect of the ban on acceptance of compensation is to reduce free-lance activity to the status of a non-profit "hobby," and related expenses become non-deductible. J.A. 80, 87-88, 184.

compensation they had received for their time, money and effort had served as a strong motivating factor. J.A. 44, 48, 51, 56, 184-85, 74-75, 83-86, 119-20. Finally, for some, constraints imposed by outside organizations precluded them from continuing their writing or speaking on an unpaid basis. Some publishers refuse to publish articles without paying for them, and some professional associations strongly discourage or prohibit their members from writing without compensation. J.A. 78, 83, 118.

C. The Decisions of the Lower Courts

1. The district court granted summary judgment in favor of the plaintiffs. Pet. App. 78a. Applying the teachings of *Simon & Schuster, Inc. v. New York State Crime Victims' Board*, 502 U.S. 105, 112 S. Ct. 501 (1991), the court held that the prohibition at issue directly burdened plaintiffs' First Amendment right of free speech by acting as a financial disincentive to constitutionally protected expressive activity. Pet. App. 63a-64a.

The court concluded that the "honoraria" ban was unconstitutionally over-inclusive because—although ostensibly intended to eliminate the possibility of official corruption—it proscribed compensation "even when there is neither the possibility nor a perception that the office and the payment are interdependent." Pet. App. 70a. The ban was also under-inclusive, the district court determined, because it singled out "appearances, speeches, and articles," while permitting payment for a "myriad" of other forms of expression "on the same subject, from the same supplicant in quest of the same government favor." Pet. App. 70a. See also *id.* at 73a.

As relief, the court struck down the honoraria ban as applied to executive branch employees, while leaving it intact as applied to the legislative and judicial branches. Pet. App. 78a. Finding that the focus of congressional concern was the correction of perceived abuses in receipt

of honoraria by Members of Congress themselves, the court concluded that Congress would have enacted the provision even without the extension of the ban to all federal employees. *Id.* at 73a-78a.

2. The court of appeals affirmed in a 2-1 decision. Pet. App. 1a-58a. Applying the test articulated in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), the Court (per Williams and Randolph, JJ.) concluded that Section 501(b) violates the First Amendment right of federal employees because it restricts substantially more speech than necessary to serve the governmental interest in avoiding impropriety or the appearance of impropriety. Pet. App. 3a-14a.

The court observed that "there would have to be some sort of nexus between the employee's job and either the subject matter of the expression or the character of the payor" in order to create "the sort of impropriety or appearance of impropriety at which the statute is evidently aimed." Pet. App. 9a. The ban in Section 501(b), however, reached much activity with "no nexus to government work that could give rise to the slightest concern." *Id.* at 10a.

The "excess sweep" of the ban, the court observed, could not be justified as a "prophylactic" measure. Pet. App. 11a-14a. As the court pointed out, there was no showing of improprieties that would be remedied by the ban "but not by prior regulations" or of "any serious enforcement or line-drawing costs associated with those regulations." *Id.* at 11a. Further, the court found, there was no suggestion of any actual public perception of a risk of corruption in the receipt of compensation by low-level government employees for speech unrelated to their duties to audiences that are equally unrelated. *Id.* at 13a.

Addressing the proper remedy, the court applied the settled principle that it should "refrain from invalidating more of the statute than is necessary." Pet. App. 14a

(citation omitted). The court therefore left Section 501(b) intact as applied to the legislative and judicial branches and invalidated it as applied to the executive branch. *Id.* at 14a-18a.

The court declined to modify Section 501(b) so as to preserve a ban on compensation when there was an "appropriate nexus" between the employee's job and the appearance, speech, or article; it believed the articulation of such a test to be "a purely legislative act." Pet. App. 14a. Finding no "construction that would trim off all or even most of the invalid applications to executive branch employees," the court held the section unconstitutional as applied to that branch. *Id.*⁹

Over the dissents of Judges Sentelle and Silberman, the court of appeals denied the government's petition for rehearing and suggestion for rehearing en banc. Pet. App. 79a-81a.

SUMMARY OF ARGUMENT

I. Section 501(b) of the Ethics Reform Act—the "honoraria" ban—prohibits any of the three million civilian executive branch employees from accepting any compensation for off-duty articles, speeches, or appearances, regardless of their subject matter or the identity of the payor. Section 501(b) both focuses its financial burden only on speech (as opposed to other income-producing activities) and sweeps broadly, encompassing a wide range of arbitrarily selected expressive activities, from drama reviews to religious lectures.

⁹ Judge Sentelle, in dissent, argued that the majority had erred in treating this case as a facial, rather than as-applied challenge to Section 501(b) (Pet. App. at 20a-30a) and also that the ban was sufficiently "narrowly tailored," even without a job nexus. *Id.* at 30a-52a. Judge Sentelle also took issue with the majority's mode of severance (*id.* at 52a-57a) because he believed that its conclusions regarding the ban's facial invalidity should have led it to strike down the ban as to all "officers and employees," leaving it in place only with respect to Members of Congress. *Id.* at 57a.

A. There can be no doubt that the ban implicates serious First Amendment concerns both by singling out and penalizing certain forms of speech, and by making it more expensive and thus more difficult for employees to engage in covered forms of expressive activity. The ban has reduced and in many cases eliminated any incentive to write articles or speak publicly. Under settled precedent of this Court, such a restriction targeting speech significantly burdens the exercise of First Amendment rights.

B. The constitutionality of restrictions on the speech of public employees is traditionally measured by the balancing test set forth in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), which seeks to accommodate "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568. Under that case and its progeny, where the government imposes burdens on the off-duty, nonwork-related speech of its employees, it must make a strong showing that its interest in promoting governmental efficiency is threatened and that its restriction on speech is no broader than is reasonably necessary to protect its interests.

The government's persistent attempts to derive a more deferential standard of review from *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), are unavailing. If anything, the ban's singling out of speech for regulation suggests that the application of a more rigorous standard of review than usually governs in the public employment context is appropriate. See *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). But in any case, subsequent precedent of this Court undermines the government's effort to use *Mitchell* to skew the *Pickering* balance in its favor.

C. Under any meaningful standard of scrutiny, Section 501(b) is unconstitutional. The ban both singles out

compensation for expressive activity without adequate justification and encroaches upon far more speech than may reasonably be considered necessary to protect the asserted interest in government integrity. In fact, the ban's irrational scope and lack of any real or perceived justification have actually led to the undermining of the credibility of government ethical standards in general, in the view of administration officials and numerous experts.

The government has not shown that speech by career executive branch employees with no nexus to government employment raises any actual or apparent impropriety. It points to no history of abuse from employees' receipt of "honoraria" or to any expressed congressional concern about such activity. Congress' focus, as even the government admits, was on the potential for abuse in the receipt of honoraria, as traditionally defined, by Members of Congress from special interest groups. The reports cited by the government as the basis for the enactment of the ban merely recommended an extension to all three branches of a prohibition on acceptance of the type of honoraria historically subject to abuse.

The government has similarly failed to justify the ban as a prophylactic measure necessary to avoid a risk of circumvention or the administrative difficulties of a narrower ban. The ban is, first, not even a genuine "prophylactic" measure, for it is riddled with exceptions and exclusions. Second, there has been no showing of significant enforcement problems with prior regulations and certainly no showing that the ban with its odd permutations would be any easier to administer. But finally, and most importantly, the government has not shown that a ban of this breadth is necessary to meet a serious problem of abuse, as is required of prophylactic rules affecting First Amendment rights. The government's speculation concerning what Congress "could have" thought that the public "could have" considered a threat is not sufficient justification under any of this Court's current jurispru-

dence, including the Hatch Act cases. In fact, the absence of any clearly articulated need for the ban—any documented potential for abuse or history of congressional or public concern—stands in sharp contrast to the well-documented record supporting the Hatch Act.

II. While adherence to the precise remedial formulation adopted by the court below is not crucial to the vindication of respondents' First Amendment rights, the remedy the court of appeals fashioned, contrary to the government's arguments, was appropriate and consistent with this Court's jurisprudence. The court properly invalidated Section 501(b) insofar as it limited the speech of executive branch employees—those as to whom a constitutional defect had been shown—while leaving intact those applications to other branches that had not been challenged and that raise "quite different considerations." Pet. App. 14a.

There is no merit to the government's argument that the court of appeals was required to identify and define the circumstances in which there would exist a constitutionally adequate "nexus" between the subject matter of the expression or the character of the payor, and devise a remedy on that basis. As the court of appeals recognized, the drafting of an appropriate nexus test—one that prohibits receipt of compensation only where it would create a real or apparent conflict with federal employment—is a task more properly left to Congress.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD THAT THE HONORARIA BAN VIOLATES THE FIRST AMENDMENT AND CRAFTED A REMEDY APPROPRIATE TO THE VIOLATION IT FOUND

I. The Ban on Compensation Significantly Interferes With the Exercise of First Amendment Rights by Singling Out Expressive Activities for a Discriminatory Financial Burden

Section 501(b) of the Ethics Reform Act prohibits acceptance of compensation—termed an "honorarium"—for any "appearance, speech or article." It thus forbids career government employees from accepting any payment for a broad range of expressive activity, from political commentary to scholarly opinion, from drama reviews to religious thought. The expression subject to the ban undeniably addresses matters of "public concern." It is the kind of speech, moreover, that has historically enriched the literary life of this country.¹⁰

A. Economic Burdens on Speech Like Those Imposed by the "Honoraria" Ban Raise Serious First Amendment Concerns

It is by now beyond dispute that an economic burden imposed on speech raises serious constitutional concerns. This Court in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 112 S. Ct.

¹⁰ There is an important historical tradition of federal government workers who were writers in their spare time. Nathaniel Hawthorne and Herman Melville worked for the Customs Service; Washington Irving served in the diplomatic corps; Bret Harte worked for the Mint; and Walt Whitman was an employee of the Justice Department. More recently, Lewis B. Puller, Jr., was an employee of the Department of Defense who gave speeches in his off-duty time about his Pulitzer Prize-winning autobiography, *Fortunate Son*, and his experiences in the Vietnam War. Until the lower court entered its order in this case, Puller was barred from accepting compensation for his speeches.

501 (1991), dispelled what the district court here termed "[a]ny lingering uncertainty" as to whether a law operating as a financial disincentive can offend the Constitution where the speaker "remain[s] at liberty to speak for free." Pet. App. 63a, 64a. It held that a regulation denying payments to an author directly burdens both his right of free speech and that of his publisher. 112 S. Ct. at 508, 509.

The Court's conclusion in *Simon & Schuster* is the logical culmination of an unbroken line of cases recognizing that financial or economic restrictions imposed on speech directly burden freedom of expression. See *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 789 n.5, 790 (1988), and *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 967 & n.16 (1984) (finding unconstitutional various restrictions on the amount of money charities can spend to solicit contributions).¹¹ As those cases confirm, regulations that impose economic constraints on expressive activity—by making it more onerous or expensive or by removing financial incentives to engage in it—significantly restrict the exercise of First Amendment rights.

Under these principles, it is clear that Section 501(b) implicates serious First Amendment concerns. Because it flatly prohibits employees from accepting compensation for numerous forms of expression, beyond reimbursement for some expenses, the ban makes it more expensive, and hence more difficult, for employees to engage in First Amendment activity. Moreover, Section 501(b), like the statute in *Simon & Schuster*, saps incentive to write articles or speak publicly by denying any profit from those activities. Echoing the maxim that "No man but a blockhead ever wrote except for money" (Boswell, *Life of Johnson*, April 5, 1776), the Second Circuit has aptly

¹¹ See also *Meyer v. Grant*, 486 U.S. 414, 422-24 (1988); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

observed that "[w]ithout a financial incentive . . . , most would-be story-tellers will decline to speak or write." *Simon & Schuster, Inc. v. Fischetti*, 916 F.2d 777, 781 (2d Cir. 1990), *aff'd in pertinent part*, 502 U.S. 105 (1991).¹²

B. The Burden on First Amendment Rights Is Compounded by the Fact that the Ban Targets Only Compensation for Expressive Activity

1. Under this Court's jurisprudence, the burden the ban imposes is significantly compounded by the fact that it targets and singles out speech for disfavored treatment. There can be no doubt that financial restrictions that target and single out speech for discriminatory treatment raise the most serious First Amendment concerns. See, e.g., *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227-31 (1987) (rejecting a tax targeting a particular category of magazine, while exempting newspapers and other types of journals); *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (rejecting tax that singled out publications for unique treatment and targeted a small group of newspapers). See also *Turner Broadcasting Sys., Inc. v. FCC*, 62 U.S.L.W. 4647, 4652 (S. Ct. June 27, 1994). Differential treatment of speech merits especially close scrutiny,

¹² The decreased willingness or ability of federal employees to produce publishable material also affects both publishers who would disseminate their message and the audiences who will be deprived of their message. That impediment to the dissemination of information implicates serious First Amendment concerns under well-established principles. See *Meyer v. Grant*, 486 U.S. at 420-425 (finding unconstitutional restrictions that limited the ability of individuals or organizations to pay others to circulate their message). The impact of Section 501(b) on the dissemination of information is demonstrated in the record of this case. Respondent NTEU Chapter 143 can no longer publish its newsletter because the individual it had paid to write articles for that newsletter—a government employee—refuses to continue writing without compensation. J.A. 58-62, 181-82.

this Court has observed, because "unless justified by some special characteristic" it may "sugges[t] that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Minneapolis Star*, 460 U.S. at 585.

Irrespective of whether Congress was motivated by such a goal here,¹³ there is no dispute that the ban affords speech differential treatment. Employees who write articles or deliver speeches are prohibited from receiving payment even if their employing agency has already determined that it would present no real or apparent conflict of interest under applicable governmental standards. See 5 C.F.R. 2635.807. At the same time, career employees remain at liberty to accept compensation for other forms of outside activity that similarly present no conflict of interest. See *id.* at 2635.802.

Moreover, although "honoraria" had been the object of abuse by Members of Congress and other high level government officials, as we show in greater detail *infra* at 31-32, there is no characteristic to the writing and speaking activities of career employees that makes them "special" (see *Minneapolis Star*, 460 U.S. at 585) when compared to other outside income-producing activities. Thus, the fact that the ban singles out expression raises unique First Amendment concerns.

2. Further, Section 501(b) forbids payment only for certain kinds of expressive activity. See *Simon & Schuster*, 112 S. Ct. at 512 (law singled out speech on a particular subject for a burden not imposed on other speech or activities). As a result of the implementing regulations, a host of exceptions and fine distinctions, many arguably content-based, have been introduced into the government-wide scheme.

¹³ See *Minneapolis Star*, 460 U.S. at 592-93 (explaining that actual legislative motives are not crucial to the constitutional analysis); *Arkansas Writers' Project*, 481 U.S. at 228 (same).

Thus, the ban extends to nonfictional articles but not to works of fiction, poetry, lyrics or script. 5 C.F.R. 2636.203(d). For nonfictional works, the form of publication is determinative: "books" and "chapters" of books are excluded from coverage, but any work deemed to be a single or two-part "article" is covered, regardless of length. *Id.*¹⁴ A public appearance is covered, unless it constitutes a "performance" involving artistic, athletic or other such talent. *Id.* at 2636.203(b). A "speech" is expansively defined as an "oral presentation" but does not encompass recitations of scripted material or sermons. *Id.* at 2636.203(c).

Consistent with these regulations, an employee may not collect compensation for a speech that happens to be funny, but may be paid for a comic performance. A religious talk would be covered by the ban, but not a sermon delivered at a worship service (unless it was delivered by a "visiting" minister). A modern Thoreau could receive no fee for an essay on nature, but a modern Whitman could be paid for his blank verse. Plaintiff Crane could be fined or fired if he received payment for his "op-ed" piece in *The Washington Post* criticizing the honoraria ban (J.A. 40), but not if he were paid by *The National Enquirer* to invent a story about octogenarian women giving birth.

As Justice Holmes long ago observed, acting as a literary critic is "a dangerous undertaking for persons trained only to the law." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903). OGE will have to make such literary judgments, for the distinctions drawn in its regulations may require an analysis of the nature of the expression to determine its fictional or

¹⁴ The regulations do not discuss pamphlets, tracts or brochures or reprints of works that first appeared in article form in a magazine. They do not define "book" or set any standards as to its length or publishing format.

artistic quotient. The line between poetry and prose can be subtle; even the distinction between fact and fiction can be a fine one, with certain kinds of expression defying categorization.¹⁵

Further, while the ban singles out certain forms of communication, it leaves employees free to accept compensation from the very same payor, for the very same message, if they package the material differently—as a three-part series or a book, for example—or if they choose a different literary form, such as poetry, fiction, or a dramatic presentation. As a result, employees will inevitably channel their off-duty activities into certain preferred media, such as books (*see, e.g.*, J.A. 75) or certain literary forms, such as fiction, thereby “distort[ing] the market for ideas.” *Leathers v. Medlock*, 499 U.S. 439, 448 (1991). In any event, the fact that the ban not only targets speech, but discriminates among forms of speech, further compounds the burden it imposes on the exercise of First Amendment rights.

C. The Government's Argument that the Ban Only Minimally Impairs the Exercise of First Amendment Rights Is Meritless

Despite the foregoing, the government characterizes the ban's burden on the exercise of First Amendment rights as “minimal” or “relatively modest.” *See* Pet. Br. 15-17. The government's contention is based upon an

¹⁵ Certain religious writings could be deemed factual accounts of historical truths (covered), mystical or poetical literature (not covered), or ethical teachings (possibly covered), depending on one's perspective. An article-length work could be fact or fiction depending on the degree of historical accuracy or literary license exercised by the author in his or her use of current or historical events. A satire, allegory, or parable could be a writer's attempt to use the fictional format to comment on current affairs. *Cf. Winters v. New York*, 333 U.S. 507, 510 (1948) (“Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.”)

approach that is both incorrect as a matter of law and factually inaccurate.

a. First, the government's argument entirely ignores the discriminatory nature of the burden the ban imposes. It does not mention the relative burdens on speech and nonspeech activities. In fact, it goes so far as to portray the disparate impact on various forms of speech activities as a *positive* feature of the ban, allegedly illustrating its modest impact. This is, in itself, a serious distortion of First Amendment jurisprudence.¹⁶

Moreover, the government misstates the burden the ban imposes on the exercise of First Amendment rights by focusing solely on its asserted financial impact on individual employees. *See* Pet. Br. 17 (declaring burden is not “severe” where individual employees are not financially dependent on their outside earnings). In *Simon & Schuster*, this Court recognized that prohibiting authors from receiving income from books concerning their crimes was a direct and serious burden on speech because of its undoubted effect in reducing the overall quantity of speech produced. 112 S. Ct. at 508-09. The Court did not deem it necessary to delve into the degree to which individual authors would be discouraged from writing; indeed, it observed that some works “would have been written without compensation.” *Id.* at 511.

¹⁶ The First Amendment does not permit restriction of one form of expression simply because another form is available. An individual has the right to select his medium; no one should be forced, for example, to transform a speech into a rap in order to transmit his message and also receive compensation for his effort. *See United States v. Grace*, 461 U.S. 171, 181 & n.10 (1983) (finding unconstitutional a statute banning some forms of expressive conduct on public sidewalks although it had been interpreted to permit other expressive conduct). *Cf. Arkansas Writers' Project*, 481 U.S. at 231 (burden on speech not alleviated by exemption for other forms of media).

Consistent with the First Amendment's "core value"—promoting "free and unhindered debate on matters of public importance"¹⁷—the key factor in *Simon & Schuster*, as in *Meyer v. Grant* and *Riley*, *supra*, was the statute's reduction of the overall quantity of speech in society. Indeed, in *Riley*, the Court flatly rejected the contention—similar to that advanced here—that financial restrictions on speech operated as only a minimal burden on speech. 487 U.S. at 787-90 & n.5. Because the ban has the "inevitable effect of reducing the total quantum of speech" on public issues (*Meyer*, 486 U.S. at 423), it operates as a matter of law as a serious burden on the exercise of First Amendment rights, irrespective of its idiosyncratic consequences for particular individuals.

b. In any event, the uncontradicted record here shows that the ban in fact had a significant adverse effect upon many individual employees' expressive activities. As set forth *supra* at 8-9, Section 501(b) had the practical effect of forcing some of the respondents to cease their freelance writing or speaking entirely, and compelled others to curtail it. Still others continued to write or speak only in the expectation of legislative or judicial relief from the effect of the ban. *See, e.g.*, J.A. 45-46, 50, 64-66, 83-84, 88, 132-35, 183-85.

In short, while some of the respondents could continue to write and speak in the short-term, the "foreseeable long-term effect" would be to reduce or eliminate their willingness to write and speak. *NTEU v. United States*, 927 F.2d 1253, 1255 (D.C. Cir. 1991).¹⁸ Accordingly,

¹⁷ *Pickering*, 391 U.S. at 573.

¹⁸ The government cites a statement in *NTEU v. United States*, 927 F.2d at 1255, that the statutory and regulatory provisions, fairly read, "encompass all of the necessary expenses" incurred by employees. Pet. Br. 16 n.18. That observation was made in affirming the denial of a preliminary injunction. Evidence adduced in the subsequent proceedings on summary judgment more fully established the nature of the expenses incurred by plaintiffs and

the government's effort to trivialize the impact of the ban on individual federal employees and on the exercise of First Amendment rights is unpersuasive.

II. The Ban Is Unconstitutional Because It Singles Out Speech Without Adequate Justification and Restricts More Speech Than Reasonably Necessary To Advance the Government's Asserted Interests

A. The Government Bears the Burden of Providing an Adequate Justification for Financial Restrictions that Target Speech by Public Employees

1. For nearly three decades, it has been firmly established that public employees have an interest in freedom of speech that is protected by the First Amendment. *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967); *see also Rankin v. McPherson*, 483 U.S. 378, 383 (1987); *Connick v. Myers*, 461 U.S. 138, 145-47 (1983); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Public employees share with other citizens a right to debate issues of "political, social, or other concern to the community." *Connick*, 461 U.S. at 146. Moreover, affording constitutional protection to the speech of public employees fosters "the public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment." *Pickering v. Board of Educ.*, 391 U.S. 563, 573 (1968) (emphasis added).

revealed that recovery of significant expenses would not be allowed by those provisions.

Thus, contrary to the government's claim that employees have the right to recoup "many" of their related expenses (*id.* at 16), the record established that employees typically incur significant non-compensable capital expenses, such as the purchase of computer equipment or the maintenance of professional libraries. J.A. 132, 45-46. In addition, they often have "actual" expenses beyond those permitted by a reasonable reading of the statute or regulations. J.A. 45-46, 65, 88, 174-75.

At the same time, the Court has recognized the government has "interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of speech of the citizenry in general." *Pickering*, 391 U.S. at 568. To protect its interest as an employer "in achieving its goals as effectively and as efficiently as possible," the government may restrict its employees' speech to a greater extent than it may, as sovereign, regulate the speech of the public at large. *Waters v. Churchill*, 62 U.S.L.W. 4397, 4401 (S. Ct. May 31, 1994) (plurality opinion). In each case, therefore, the Court endeavors to strike "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

In striking the balance, the weight and nature of the government's burden may vary, depending on the character of the employee's expression. *Connick*, 461 U.S. at 150. Where, as in *Connick*, the employee's speech both occurs on-duty and "touch[es] upon matters of public concern only in a most limited sense" (*id.* at 154), the government need show only a "reasonable belief" that the speech would interfere with efficient office operations. *Id.* at 151-52. By contrast, where the speech more substantially involves a matter of public concern, the Court has "caution[ed] that a stronger showing may be necessary." *Id.* at 152. Accord, *Waters v. Churchill*, 62 U.S.L.W. at 4401 (where employee speech substantially involves matters of public concern, "the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished").¹⁹

¹⁹ See also *Rankin*, 483 U.S. at 388-89 (noting "no evidence that [statement] interfered with the efficient functioning of the office"); *Pickering*, 391 U.S. at 567, 570-73 (statements "neither shown nor can be presumed" to have impeded teacher's performance or inter-

In short, the Court's jurisprudence permits the government greater latitude in regulating the speech of public employees than the speech of citizens in general. Nonetheless, where, as here, the affected government employees are engaging in speech of unquestioned public concern on their own time, with no connection to their status as government employees, the government must bear some meaningful burden of justification. At a minimum, the government must show its restriction is no broader than is "reasonably necessary" to protect its substantial interest. See *Brown v. Glines*, 444 U.S. 348, 355 (1980); see also *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (ban on certain partisan political activity by federal employees was not "fatally overbroad" (*id.* at 580) and was supported by "obviously important" government interests (*id.* at 564)); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding challenge to state statute regulating political activity by state employees where not substantially overbroad).

This requirement—that there be a reasonable "fit" between the asserted legislative objective and the means chosen to achieve that objective—does not equate to the application of a "rigid" "narrow tailoring" test, as the

ferred with school's operation). Accord *Jeffries v. Harleston*, 21 F.3d 1238, 1246 (2d Cir. 1994) (if speech "substantially addressed" public issues, government must show statements "actually undermined the effective and efficient operation" of school); *Hyland v. Wonder*, 972 F.2d 1129, 1139-40 (9th Cir. 1992) (stating that "[t]he more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made," the court required a showing of actual, material, and substantial disruption); *Coughlin v. Lee*, 946 F.2d 1152, 1157 (5th Cir. 1991) ("[t]he more central a matter of public concern is to the speech at issue, the stronger the employer's showing of counter-balancing governmental interest must be"); *Schalk v. Gallemore*, 906 F.2d 491, 496 (10th Cir. 1990) (requiring evidence of actual disruption of services resulting from speech on matter of public concern); *American Postal Workers Union v. United States Postal Serv.*, 620 F.2d 294, 303-04 (D.C. Cir. 1987) (same).

government suggests (Pet. Br. 24 n.21). Rather, as Judge Williams observed below (Pet. App. 87a), the requirement of an adequate fit between the means and the ends is an inherent component of the *Pickering* balancing test, for "if the burden on speech is greater than is appropriate to achieve the government's end . . . it is hard to see what interest justifies the excess burdens."

2. In its brief, the government repeatedly repairs to a highly deferential formulation of the standard of review that it purports to derive from language this Court used over half a century ago in *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). It urges that under *Mitchell*, "speculative" assertions of harm to a government interest can be used to demonstrate the reasonableness of Congress' judgment when it imposes burdens on employee speech. See Pet. Br. 14, quoting 330 U.S. at 101; see also *id.* at 18, 25, 27, 29, 30-31. This contention is unavailing.

First, if anything, Congress' seemingly cavalier decision to cover career employees (see *infra* at 31-36), and the ban's discriminatory impact on speech, suggest that the standard of review should be *more* and not *less* rigorous than that usually applied in the public employment context. In the more typical case examining the reasonableness of an employment-related restriction on speech, the government employer makes the reasons for the restriction clear and can mount at least a credible effort to show that the speech is somehow disruptive to the effective functioning of the workplace. In such cases, even though the speech is protected by the First Amendment, the restriction may be permissible because the government, like any employer, is entitled to protect its interest in the effective functioning of the workplace, whether it is threatened by speech or by some other conduct. See *Waters*, 62 U.S.L.W. at 4400.

The honoraria ban does not fit readily within the *Pickering* paradigm. Here, for reasons that can most charita-

bly be termed "unclear," the government employer is singling out employees' off-duty nonwork-related speech for adverse treatment while not penalizing other, non-speech activities that could have an equal potential to disrupt its interests as an employer. As noted *supra*, this Court has recognized that regulations that so target speech raise special concerns and so merit special scrutiny. See *Minneapolis Star*, *supra*; see also *Turner Broadcasting Sys., Inc. v. FCC*, 62 U.S.L.W. at 4652. These concerns are no less applicable when the speech the government is targeting happens to be that of its own employees, and suggest that this case can be resolved without resort to the *Pickering* formulation.

In any event, there is no merit to the government's argument that *Mitchell* renders this Court little more than a rubber-stamp for legislative restrictions on the exercise of First Amendment rights by public employees. As this Court has observed, *Mitchell* was decided when the Court embraced the now-rejected view that a public employee has no right to object to even unconstitutional conditions placed on the terms of employment. *Connick*, 461 U.S. at 143-44. *Mitchell*'s language averting to what Congress "may have concluded" or "may have thought" (Pet. Br. 27, quoting 330 U.S. at 101, 102) must be read in light of subsequent decisions that "cast new light" on the scope of public employee rights. *Connick*, 461 U.S. at 144.²⁰

As the court of appeals recognized, under those decisions—*Pickering* and its progeny—the proper inquiry in this case is whether the governmental interests are in fact substantial and whether the ban limits more speech than is reasonably necessary to advance those substantial

²⁰ While *Mitchell*'s result was confirmed in *Letter Carriers*, the Court there undertook a far more searching inquiry into the historical justifications for the Hatch Act (413 U.S. at 557-63, 565-66), and went to some pains to construe the statute to avoid overbreadth problems. *Id.* at 571-81.

interests. As we now show, the ban must be ruled unconstitutional, measured by that or any meaningful standard.

B. The Government Has Failed to Justify the Ban's Discriminatory Impact on Speech or Show that the Ban Is Reasonably Necessary to Avoid Real or Apparent Conflicts of Interest in the Career Civil Service

The government proffers three interests in justification of the broad scope of Section 501(b): an interest in promoting the integrity of its workforce; the need to avoid the risk of evasion; and an interest in administrative efficiency. Pet. Br. 17-23. The credibility of these rationales is highly suspect—particularly where the ban singles out only speech for financial burden, and not other income-producing activity.²¹ Moreover, while the interests the government asserts are important in the abstract, the ban is constitutionally defective because, as the court of appeals discerned, it goes substantially further than is necessary to achieve these objectives.

1. *A government employee's receipt of compensation for off-duty speech with no nexus to his or her job does not give rise to either the reality or appearance of impropriety*

The government's primary stated justification for Section 501(b) is its interest in avoiding actual or apparent impropriety within the federal workforce. The govern-

²¹ In place of a persuasive rationale for the ban's disparate treatment of speech, the government repairs to Congress' alleged right to "extrapolate" from its own experience with honoraria and act in anticipation of possible future problems. Pet. Br. 29, 31-32. Of course, there is no evidence that Congress was engaging in any such extrapolation here. There is, moreover, no rational basis for the extrapolation the government posits in light of the materially different contexts presented—receipt of "honoraria" by Members of Congress from special interest groups, on the one hand, and receipt of payment by career civil servants for their free-lance writing and speaking, on the other.

ment has failed to show that a ban on receipt of compensation for speech with no connection to employment serves that interest.

a. As we have emphasized, Section 501(b) covers activities unrelated to the employee's government job, where the payor has no interest that might be advanced by the employee, and where the writing and speaking occur on nongovernment-time, without use of government resources. It forbids a microbiologist with the Food and Drug Administration from accepting payment for dance reviews published in *The Washington Post*. J.A. 77-79. It equally precludes an aerospace engineer with the Goddard Space Flight Center from accepting a fee for lecturing on Black History to an audience at the Maryland Institute of Art. J.A. 63.

In neither of these examples, nor in countless others, can a credible argument be made that the employees' conduct threatens *any* government interest, much less a substantial one. As the court of appeals correctly discerned, only compensation for expressive activity that has some connection to the employee's job—either through the subject matter of the activity or the identity of the payor—would create "the sort of impropriety or appearance of impropriety at which the statute is evidently aimed." Pet. App. 9a.

Moreover, the fact that the ban restricts only certain kinds of expression, while permitting compensation for other kinds, as well as for nonspeech activity, greatly undermines the government's rationale for burdening speech in the first place. See *City of Ladue v. Gilleo*, 62 U.S.L.W. 4477, 4480 (S. Ct. June 13, 1994) (under-inclusiveness of a regulation of speech "may diminish the credibility of the government's rationale for restricting speech in the first place"). Indeed, in our view, the ban's under-inclusiveness, which was also pointed out by the district court (Pet. App. 73a), presents a separate ground for finding it unconstitutional.

The court of appeals was correct when it recognized that Section 501(b) reaches much compensation that could not give rise to "the slightest concern." *Id.* In fact, banning such untroubling compensation appears to be the *only* effect of Section 501(b). As we have noted, all executive branch employees are already subject to statutes and regulations that effectively forbid them from engaging in any conduct—paid or unpaid, and expressive or non-expressive—that could give rise to impropriety or the appearance of impropriety.²² In addition, individual agencies have issued supplemental regulations that are tailored to their particular needs. Accordingly, as independent experts on government ethics,²³ as well as

²² By regulation, *any* activity by an executive branch employee, including any writing, speaking, or appearances, that "conflicts with an employee's official duties" is prohibited. 5 C.F.R. 2635.802. Acceptance of compensation for teaching, speaking, or writing is specifically prohibited if it "relates to the employee's official duties." *Id.* at 2635.807(a). The regulations further define, in detail, when an activity is deemed to "relate to" the employee's official duties. *Id.* at 2635.807(a)(2)(i). Moreover, as discussed *supra*, n.6, the regulations contain extensive prohibitions on misuse of position, including use of public office for private gain. *Id.* at 2635.701, *et seq.*

Federal statutes, further, prohibit receipt of compensation for government service or supplementation of salary from a private party (18 U.S.C. 209 (1988 & Supp. IV 1992)), as well as solicitation or receipt of bribes (18 U.S.C. 201(b) and (c)).

²³ In a report on government ethics published in 1993, a distinguished Committee on Government Standards, assembled under the auspices of the American Bar Association's Section on Administrative Law and Regulatory Practice, concluded that the "honoraria" ban was counterproductive. Cynthia Farina, *Keeping Faith: Government Ethics & Government Ethics Regulation*, 45 Admin. L. Rev. 287, 316-22 (Summer 1993). It found that the ban was significantly under- and over-inclusive and sent employees "muddled" signals, thereby forfeiting employees' respect. *Id.* at 320. The statute and regulations, it stated, "demonstrate[] neither a coherent vision of the dangers that would justify such substantial restrictions, nor a careful attempt to focus prohibitions on the activities and the people presenting the greatest risk." *Id.* at 316.

government officials from the Director of OGE through then-President Bush, have recognized,²⁴ the abrupt introduction of the ban's permutations into this complex regulatory scheme furthers no significant government interest.

b. The legislative history of the Act further belies the government's allegation that ethical concerns are implicated when career employees are compensated for writing or speaking on a subject that has no nexus to their employment from a payor with no business before their agency. On the contrary, it confirms that Congress' major concern was the potential for abuse in the acceptance of honoraria—as traditionally defined—by Members of Congress for speeches to companies or interest groups that might some day seek their assistance.²⁵ That practice was

It concluded that this sort of restriction "raises serious concerns about whether First Amendment values are being appropriately honored." *Id.* at 317. For further discussion, see brief of amicus Public Citizen.

²⁴ The Director of the Office of Government Ethics—the official charged with administering this statute—has stated that the ban on receipt of "honoraria" by executive branch employees is both unnecessary and "too restrictive." J.A. 122-23. He has testified before Congress that the ban actually thwarts the interests the government articulates, by undermining the credibility of other ethical standards. S. Rep. No. 29, 102d Cong., 1st Sess. 6 (1991). President Bush expressed the same views when he reluctantly signed into law a provision that exempted only a limited group, rather than the whole career workforce as he had urged, from the strictures of the ban. See *infra* at n.34. He declared that the effect of the inappropriately limited amendment is to undermine "the credibility of all the standards to which we ask employees to adhere." Signing Statement, 28 Weekly Comp. Pres. Doc. 2073 (Nov. 2, 1992).

²⁵ It is that type of abusive practice that the government and amicus Common Cause describe as raising concern among the public and Members of Congress. See Pet. Br. 32; CC Br. 6-9, 14-15. Although Common Cause cites to newspaper accounts of impropriety (CC Br. 8 n.10), those focus almost exclusively on abuses by congressional staffers; while one refers to "improper payments" to executive branch officials, it is unclear whether those payments were in the form of "honoraria." The "extensive aca-

widely perceived as a means for special interest groups to gain influence or buy access to Members of Congress, especially given the often significant sums of money involved. *See* Pet. App. 15a-16a, 75a-77a.²⁶

The Report of the Bipartisan Task Force on Ethics echoed the same concern that "substantial payments to a Member of Congress for rendering personal services to outside organizations presents [sic] a significant and avoidable potential for conflict of interest." 135 Cong. Rec. H9256 (daily ed. Nov. 21, 1989). The Task Force perceived a need to assure the public that Members were "not using their positions of influence for personal gain." *Id.*

Congress' response was to adopt a comprehensive reform of its compensation system. The House, followed in 1991 by the Senate, banned receipt of honoraria and imposed limits on outside income, coupled with—and conditioned on—acceptance of a 25-percent pay increase. *See* Pub. L. 101-194, Title VI, Sec. 603, 103 Stat. 1763, codified at 2 U.S.C. 31-1 note (providing that the pro-

democratic literature" on the "capture" of executive branch officials by regulated interests cited by Common Cause (CC Br. 14-15 & n.27) does not address alleged abuse in the receipt of compensation by career executive branch employees for nonwork-related writing or speaking. Only one (P. Quirk, *Industry Influence in Federal Regulatory Agencies* (1981)) mentions the possibility of abuse in "speaking engagements," and even it does not further explore the issue.

²⁶ The floor debates addressed almost exclusively the public perception that receipt of honoraria by Members of Congress constituted influence-buying and improper supplementation of salary. No Member discussed any actual abuse or perception of abuse by career government employees or offered any other rationale for including them within the scope of the "honoraria" ban. Virtually all legislative references are to Members of Congress themselves. While there are a few references to senior executive branch officials and the judiciary (*see, e.g.*, 135 Cong. Rec. H8746, H8747 ((daily ed. Nov. 16, 1989) (statement of Rep. Fazio); S15987 (daily ed. Nov. 17, 1989) (statement of Sen. Mitchell))), there is no discussion of abuses by such officials.

hibition on receipt of honoraria will "cease to be effective" if the pay increases were repealed).²⁷

The scope of the financial *quid pro quo* roughly mirrored congressional concern about honoraria abuse. Members of Congress, the judiciary, and senior political appointees within the executive branch in positions in the Executive Schedule received the 25-percent increase in exchange for a ban on receipt of honoraria. Career government employees—whose receipt of outside income was not the subject of concern on the part of any Member of Congress—received no pay increase.

Thus, the legislative record does not support the concern the government articulates—that employee acceptance of "honoraria" with no nexus to employment threatens integrity or creates a public perception of impropriety. In fact, the legislative record lacks even a suggestion of congressional concern that such a perception *might* develop in the future. Rather, that record reflects Congress' preoccupation with its own public image, and an at-most derivative concern about abuses by high level government officials in other branches.²⁸

²⁷ The Task Force recommended a 25-percent salary increase as part of a "comprehensive ethics package." 135 Cong. Rec. H9266, H9254 (daily ed. Nov. 21, 1989). *See also* *Fairness for Our Public Servants: The Report of the 1989 Commission on Executive, Legislative and Judicial Salaries* (Dec. 1988) (*Quadrennial Commission Report*), which focused on the erosion of salary levels and the practice of salary supplementation by Members of Congress who accepted "substantial amounts of 'honoraria' for meeting with interest groups which desire to influence their votes." J.A. 222. *See also* J.A. 228, 232-34. Its recommendation of salary adjustments was contingent on the abolition of honoraria, "effective when the recommended pay increases begin." J.A. 229.

²⁸ Subsequent history provides good reason to believe that Congress no longer believes the ban as enacted is necessary if, indeed, it ever did. There has been virtually unanimous support in both houses of Congress for measures to amend the statute to eliminate the flat government-wide ban, although passage has been blocked by a single Senator. J.A. 196. *See* discussion of congressional

c. The government places extensive and undue reliance upon the reports of the Quadrennial Commission and the Wilkey Commission. Pet. Br. 19-20. The Quadrennial Commission merely recommended, without any discussion or supporting findings, "that the practice of accepting honoraria in all three branches be terminated by statute." J.A. 234. Importantly, it defined "honoraria" as "payments for public appearances to deliver a talk or engage in a colloquy at the invitation of some non-governmental group, often one with a material interest in pending or anticipated legislation." J.A. 232-33. Its definition did not include payment for written work, nor did it seem to encompass the receipt of payment from persons or groups not involved in the legislative process.²⁹

In addition, the Quadrennial Commission appeared to limit its recommendation to "top" officials of the executive

action at Pet. App. 90a-92a (Silberman, J., dissenting from the denial of rehearing *en banc*) (noting unanimous Senate support for an amendment); *id.* at 78a n.15 (Jackson, J.).

Both the administration and Common Cause have supported legislation to permit career government employees at any salary level to accept compensation for articles, appearances, or speeches if unrelated to their official duties and if the party offering the payment had no interests that might be substantially affected by the performance or nonperformance of the individual's official duties. J.A. 196; 136 Cong. Rec. S17258 (daily ed. Oct. 26, 1990) (statement of Sen. Glenn excerpting letter from Potts); 137 Cong. Rec. H11,270 (daily ed. Nov. 25, 1991) (statement of Rep. Frank).

Similar legislation was reintroduced in the House on February 24, 1993, as H.R. 1095.

²⁹ Contrary to the government's suggestion (Pet. Br. 20), the Commission's recommendation that a broader statutory definition of "honoraria" be adopted does not indicate that it contemplated a prohibition of any compensation for all types of appearances, speeches, or articles. Rather, the Commission suggested only a definition that would close loopholes "such as receipt of consulting, professional or similar fees; payments for serving on boards" and other expenses. J.A. 234. These are all categories of payments historically subject to abuse by Members of Congress, rather than career government employees.

and judicial branches, as well as to the legislative branch. Thus, it refers only once to acceptance of honoraria in the executive branch, and then in the context of "top officials." J.A. 222 ("Albeit to a less troubling extent, the practice of accepting honoraria also extends to top officials of the Executive and Judicial branches.").

The President's Commission on Federal Ethics Law Reform (the Wilkey Commission) borrowed the Quadrennial Commission's definition of "honoraria."³⁰ Consistent with that definition, it focused on payments for speeches to special interest groups. Thus, it noted with approval that executive branch officials are forbidden from receiving honoraria for "any speeches, writings, or other actions undertaken in their official capacity" and contrasted that to the "notorious" practice in the legislative branch of accepting substantial sums for appearances at industry meetings. *To Serve With Honor* at 3-4, 35, J.A. 252-53. Against this backdrop, it is apparent that the "extreme lack of uniformity" targeted by the Wilkey Commission (*id.* at 35, J.A. 252) was the failure of the legislative branch to be held to the higher standards of the executive branch.³¹

In short, the government's reliance on the two commission reports is clearly misplaced. The all-encompassing definition of "honorarium" contained in Section 501(b) goes further than anything contemplated by either commission. That definition, and the regulatory definitions of covered activity, together preclude compensation for a range of activity that neither commission had identified

³⁰ *To Serve With Honor: Report of the President's Commission on Federal Ethics Law Reform* 35 (Mar. 1989), J.A. 253-54 (*To Serve With Honor*).

³¹ The government's effort to elevate the importance of the Wilkey Commission report is curious given Congress' disregard of the Commission's stated interest in having a "uniform" ban. As previously noted, the initial statutory provision did not include Senators and their staff within the scope of the ban.

as the source of any abuse or potential for abuse.³² Indeed, neither commission even purported to study whether conflict of interest questions arise when, for instance, a government file clerk gets paid for giving a talk on growing roses or for writing about Black History Month. Their reports, therefore, simply cannot serve to explain the inexplicable—Congress' rationale in enacting the broad ban.

d. Lacking anything in the legislative record to establish a substantial interest in restricting receipt of compensation by career employees for speech that has no nexus to their jobs, the government is forced to revert to its own speculation. See Pet. Br. 18-20, 24-26. It observes that the public may be unaware of a particular employee's duties or whether a payor has business before the employee's agency. The government urges, therefore, that Congress "could have reasonably deemed" that the receipt of compensation by *any* employee for speech on *any* topic, from *any* payor, might create a public perception of impropriety. Pet. Br. 25.

The government's assertion that "[v]irtually any payment for employee speech could . . . trigger citizen concern" (*id.*) borders on the irrational. While public skepticism about the ethical practices of elected officials may be at an all-time high, it is less than self-evident that the public has similar suspicions about employees at every level of the career civil service. Further, the government provides no persuasive basis for expecting that public suspicions would be particularly aroused by receipt of

³² In fact, the Wilkey Commission expressly mentioned the writing of "scholarly articles" as an activity that "can benefit both the federal employees and society at large," which it "would not want to preclude or discourage." *To Serve With Honor* at 37, J.A. 256. It proposed to subject such activity, along with other income-producing activities, only to a general cap on outside earned income, applicable to Members of Congress, judges, and noncareer civil servants compensated at GS-16 and above. *Id.*

compensation for articles and speeches, as opposed to other income-producing activities.

In any case, even were the government's suppositions within the realm of reason, naked speculation about potential harms to governmental interests fails, as a matter of law, to justify the burden the ban imposes on First Amendment rights. As Justice Kennedy recently noted in an analogous context (*Turner Broadcasting*, 62 U.S.L.W. at 4658), "[w]hen the government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'" (Citations omitted). In fact, the government must make a substantial demonstration that its predictions of harm to its asserted interests as an employer are reasonable, where, as here, the speech at issue involves matters of public concern. See, e.g., *Waters v. Churchill*, 62 U.S.L.W. at 4401; *Rankin*, 483 U.S. at 388-89; *Pickering*, 391 U.S. at 567, 570-73.³³ It is beyond dispute that the government has failed to make the requisite demonstration in this case.

³³ In an effort to establish its authority to speculate here, the government cites selectively from portions of the plurality's opinion in *Waters v. Churchill*, 62 U.S.L.W. at 4401, that summarized the various results that have been reached in this Court's public employee speech cases upon application of the *Pickering* balance. Pet. Br. 29, 31. The plurality did not, as the government appears to suggest, endorse a new highly deferential test for all restrictions on employee speech. Rather, it noted that on some occasions the Court had given "substantial weight" to the government's predictions of disruption, at least where those predictions were "reasonable." At the same time, the plurality confirmed that in "many" situations, "a public employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters." In those cases, the plurality recognized, "the government may have to make a substantial showing that the speech is in fact likely to be disruptive." *Waters*, 62 U.S.L.W. at 4401.

2. *The government has failed to show that a broad ban is necessary as a prophylactic measure or for administrative convenience*

The government further defends the excessive sweep of the ban as a prophylactic measure, necessary to avoid any risk of circumvention and for administrative convenience. Pet. Br. 20. This argument fails for two reasons. First, the ban is hardly the prophylactic measure "with no grey areas" that the government claims. Pet. Br. 25. Second, prophylactic rules that restrict First Amendment rights must be supported by an adequate justification; the ban is not.

a. As described *supra* at 5-6, 18-20, the ban is, by statutory design and by regulatory interpretation, decidedly "grey." There were, and are, significant gaps in the statute's coverage. Initially, of course, the ban excluded Senators and their staff. Now, faculty and students at Department of Defense schools are subject to a narrower restriction.³⁴ Moreover, while military officers and civilian employees at all grade levels are covered, *enlisted* military personnel are not covered by the ban.

From the standpoint of covered activity, as well, the statute draws arbitrary and irrational lines. First, the ban at best serves as a "prophylactic" only with respect to compensation for expressive activity, for it leaves employees free to engage in all other forms of moonlighting. More importantly, the ban offers ample opportunity for

³⁴ In the National Defense Authorization Act for Fiscal Year 1993, Congress enacted a narrow exception to the "honoraria" ban applicable to "a faculty member or a student at a Department of Defense school." Pub. L. 102-484, 106 Stat. 2413, codified at 10 U.S.C. 2161 note, App. 1a. Such individuals may accept an "honorarium," up to a maximum of \$2000, for "an appearance, a speech, or an article published in a bona fide publication" if the undertaking "is customary for scholarly or academic activities normally associated with institutions of higher learning" and if it satisfies certain other conditions to assure the absence of a conflict of interest. App. 1a-3a.

evasion of its strictures as to compensation for expressive activity. It prohibits acceptance of honoraria for one or two appearances, speeches, or articles, but permits payment for three or more, if packaged as a "series."³⁵ It also permits payment for what the district court termed the "myriad other forms of expression" on the same subject from the same audience (Pet. App. 70a).

Moreover, the statute allows an individual to accept reimbursement for travel expenses (transportation, lodging and meals) for himself *and one relative*. It thereby continues the often-criticized practice of Members of Congress vacationing at posh resorts in exchange for some brief remarks.³⁶ Obviously, the typical civil servant is not offered similar all-expense-paid junkets.

The regulations OGE has issued have added countless exceptions to the categories of covered speech and to the definition of "honoraria." They distinguish between performance and appearance, poetry and prose, and article and chapter. They allow individuals to receive compensation for courses taught at a public or private university or public high school but not a private high school. See 5 C.F.R. 2636.203(a)(8), (9). They permit an individual compensation for his outside activity if he is on a payroll, but not if he is an independent contractor. See *id.* at 2636.203(a)(7).

It is thus clear, not only that the ban is a poor prophylactic, but that formidable administrative difficulties

³⁵ For Judge Silberman, Congress' insertion of the exception for "series" undermined "any asserted interest in a prophylactic flat ban on paid speeches." Pet. App. 101a (dissenting from denial of rehearing). For that reason, therefore, he suggested that he would have found the statute to be unconstitutional. *Id.*

³⁶ Such expense-paid trips to resorts—often of greater value than the now-forfeited honoraria—are commonly perceived by the public as an improper "perk" and an abuse of the Member's position. See *Getting Better on Ethics*, Wash. Post, April 27, 1994 (discussing legislative proposals to ban privately funded travel and lodging for substantially recreational "charitable events").

are inherent in the ban as enacted. Administration of its requirements requires both a centralized federal ethics office and individualized determinations by agency ethics officers—precisely those administrative costs that the ban was to have avoided. Pet. Br. 21. The government's argument that the ban serves its interest in avoiding the "administrative difficulties" that would attach to a rule dependent on case-by-case judgments (Pet. Br. 20-21) is simply not credible.³⁷

In short, Section 501(b) cannot seriously be cast as a uniform and impermeable ban, and defended on that basis. It shares precisely those flaws that a prophylactic ban is supposed to avoid: it is easily circumvented by an employee inclined to redirect his energies into one of the permissible activities; it is difficult to interpret and to administer; and it rests on narrow and arbitrary distinctions that damage the credibility of the provision as a whole, as well as governmental ethical standards in general.

b. In any event, even assuming that the ban is appropriately characterized as a prophylactic measure, its impact on expressive activities is not sufficiently justified by important government interests. Broad prophylactic rules affecting speech are, as a general rule, constitutionally "suspect." See *NAACP v. Button*, 371 U.S. 415, 438 (1963). Here, the court of appeals found the "excess

³⁷ Contrary to the government's claim (Pet. Br. 21-22 n.19), there is no real difference between the type of subjective interpretations required in determining whether conduct constitutes a conflict of interest and those required to determine whether a particular activity falls within the scope of the regulations. As discussed *supra* at 18-20, the latter inquiry may require subtle distinctions based on the content of the expressive activity. Moreover, administration of the "series" exception will require a case-by-case review of the nexus between the speech and the payor, a review identical to that required under pre-existing conflict of interest rules.

sweep of the ban" supported by nothing more than "theoretical possibilities." Pet. App. 14a.

The government objects that, in so concluding, the court of appeals improperly held Congress to the same burden applied in *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985), and *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). It contends that those cases did not apply a "lenient" government employee First Amendment standard, but instead examined "fully protected" speech by "private persons." Pet. Br. 30.

The government's objection is unpersuasive. Even in the sphere of commercial speech, where there is an analogous "lenient" standard which considers only whether a restriction on speech is "tailored in a reasonable manner" (*Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993)), this Court has consistently recognized that something more than unsubstantiated speculation is required to sustain a "prophylactic" measure that burdens speech activities. It has instructed that prophylactic measures may not be "lightly justified." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 649 (1985). Rather, a prophylactic measure may be justified only where it addresses what "is in fact a serious problem" and where the State has shown "that the preventative measure it proposes will contribute in a material way to solving that problem." *Edenfield*, 113 S. Ct. at 1803 (finding unconstitutional a restriction on commercial speech justified as a prophylactic rule in the absence of a showing that the State's fear was "well founded"). *Accord Ibanez v. Florida Dept. of Business & Prof. Regulation, Bd. of Accountancy*, 62 U.S.L.W. 4503, 4505, 4507 (S. Ct. June 13, 1994); *Turner Broadcasting*, 62 U.S.L.W. at 4658 (plurality opinion).

The government's purported justification for the honoraria ban does not remotely satisfy these principles. As we showed *supra* at 28 n.21, 31 n.25, beyond its resort to inapposite analogies, the government has not even

attempted to establish a "serious" existing or potential problem of abuse of honoraria by career government employees. Indeed, it tacitly admits that there was no evidence of abuse outside the legislative branch (Pet. Br. 28-29) or even the perception of abuse (*see* Pet. Br. 31-32) when Congress enacted Section 501(b).

The government's argument, in addition, incorrectly presumes that the pre-existing regulatory and statutory scheme created "administrative difficulties." As the court of appeals noted, the government never attempted to identify "any serious enforcement or line-drawing costs" associated with the prior regulations. Pet. App. 11a. At most, the government has pointed to isolated problems, which have already been addressed by OGE.³⁸

c. Finally, the government's effort to manufacture a conflict between the result the court of appeals reached here and the Hatch Act cases (Pet. Br. 26-28) is mis-

³⁸ The government relies on a report by the General Accounting Office (reprinted as an appendix to Common Cause's brief filed Mar. 24, 1994), which issued *after* the enactment of Section 501(b), to show the "difficulties of a more limited ban." Pet. Br. 22-23. That reliance is unavailing. The GAO report surveyed 11 agencies and identified some concerns with certain of the agencies' approval processes for outside employment in general, including the amount of information required by the agencies. CC App. 9a-11a. It further noted some activity approved by the agencies that focused, in its opinion, on the agencies' responsibilities or the employees' official duties. *Id.* at 13a-16a. Only some of that conduct involved speech that would be covered by the honoraria ban. *Id.* at 8a-9a, 12a (Tables 1 and 2).

Several of the agencies disagreed with GAO's definition of job-relatedness or its conclusion that the activity constituted a conflict of interest. *Id.* at 23a. Even assuming, however, that GAO is correct in its assessment of the degree of "relatedness" and in the conclusions it drew, it found few instances of questionable conduct. Moreover, it concluded that the risk of a conflict could be minimized if appropriate criteria were applied by the agency. *Id.* at 20a. OGE subsequently issued comprehensive government-wide regulations that it believes answer GAO's concerns. *Id.* at 21a-22a.

placed. In fact, the court of appeals explicitly acknowledged "the authority of Congress to enact broad prophylactic rules" under *Mitchell* (Pet. App. 12a). It held, however, that the justification offered here for such a rule fell short of that provided in *Mitchell*.³⁹

The court of appeals' conclusion was correct. This Court sustained the Hatch Act restrictions on employee speech because they were aimed at a well-documented threat affecting employees throughout the government. Thus, in *Mitchell*, 330 U.S. at 103, the Court upheld the Hatch Act prohibitions in the context of a *demonstrated* "menace" of public employee involvement in partisan politics. The executive branch had regulated such involvement for decades before Congress enacted legislation. Over the years, that regulation had been approved in some form by both the courts and "a large body of informed public opinion." *Id.* Moreover, the evils addressed by the Hatch Act—political partisanship by the civil service—extended to every level of the service. As the Court observed, political activity by even a non-policy-making employee, such as a roller in the Mint, might "promote or retard his advancement or preferment with his superiors." *Id.* at 101.

Similarly, when this Court returned to the issue in *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 557 (1973), it underscored the "judgment of history," from Thomas Jefferson

³⁹ The government's assertion (Pet. Br. 28) that the court of appeals limited *Mitchell* to "subtle forms of abuse" is incorrect. The court simply noted that less evidence would be expected to justify a prophylactic rule where, as in *Mitchell*, it would be "in the nature of the evil to be averted that it will be concealed." Pet. App. 13a. There, the potential for supervisory pressure on subordinates to vote a certain way or perform political chores would be "not only pervasive but inherently difficult to demonstrate or assess." *Id.* Here, by contrast, the court found no reason to believe that a public perception of corruption would not be readily apparent, if it existed. *Id.* at 13a-14a.

and the reformers in the 19th century to the Civil Service rules as evolved in the last century, that vital government interests are clearly at risk when public employees become involved in partisan politics. The Court further cited the abundant record evidence demonstrating a clear need to protect government workers from supervisory coercion; to ensure merit-based employment decisions; and to guard against real and apparent abuses in enforcement of the law. *Id.* at 564-66.

In short, there was a documented record of abuse and decades of regulation to support the congressional concerns behind the Hatch Act, and those concerns were clearly articulated. Here, by contrast, there is no similar history of actual abuses and the legislative record is virtually silent on any subject other than receipt of honoraria by Members of Congress. And while the Hatch Act "evolved over a century of governmental experimentation with less restrictive alternatives that proved inadequate to maintain the efficient operation of government,"⁴⁰ the ban on receipt of "honoraria" by career employees was casually superimposed upon a regulatory scheme that had been essentially sound. The lower court's analysis and conclusions are thus fully consistent with *Mitchell* and *Letter Carriers* and should be affirmed by this Court.

III. The Court of Appeals' Remedy Is Appropriate to the Violation Found

The court of appeals determined that Section 501(b) is unconstitutional because it is not limited to writing and speaking activities that bear a sufficient nexus to federal employment. The court recognized that the root of the statute's constitutional defect is in its design—that by encompassing all articles and speeches (including those in which there is no such "nexus"), the statute

⁴⁰ *FCC v. League of Women Voters of California*, 468 U.S. 364, 401 n.27 (1984) (characterizing Hatch Act).

limits the exercise of First Amendment rights far more than reasonably necessary to further the government's interests.

To remedy the statute's defects, the court accommodated competing jurisprudential principles. It invalidated Section 501(b) insofar as it limited the speech of executive branch employees—those as to whom a constitutional defect had been shown—while leaving intact those applications to other branches that had not been challenged and that raise "quite different considerations." Pet. App. 14a.

The government contends that the court's remedy was "overbroad." Pet. Br. 36. It urges that the court should not have struck the ban as to the entire executive branch, but should have declared the ban unconstitutional as applied to speech lacking a nexus to federal employment, and enjoined its application only to that extent. *Id.* at 37-38, 42-43.

A. At the outset, we note that adherence to the precise remedial formulation adopted by the court of appeals is not, as a practical matter, crucial to vindication of respondents' First Amendment rights. Respondents include approximately a dozen named plaintiffs who are employed within the executive branch at grades GS-16 and below, as well as similarly situated unnamed employees at grades GS-15 and below. Before the statutory honoraria ban went into effect, all of them were allowed to receive compensation for their writing and speaking activities. See, e.g., J.A. 11 (defining class).

Respondents' central aim was to obtain an injunction precluding the government from enforcing the statutory ban as to their receipt of compensation for writing and speaking that does not create either a real or apparent conflict with their federal employment. That practical result was achieved by the court of appeals' ruling. It could also be achieved by a remedy similar to the one

urged by the government—by holding the ban invalid as applied to respondents' writing and speaking activities, which have no nexus to their federal employment.

B. Respondents maintain, however, that the approach followed by the court of appeals is plainly defensible and consistent with the "principle that a statute should not be invalidated to a greater extent than is necessary" (Pet. Br. 36). This Court's precedent teaches that where, as here, "the scope of invalid applications" of a statute is large, a statute is not properly tailored and thus subject to facial invalidation. See *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 965 n.13 (1984) (where a statute is not adequately tailored, it fell "short of constitutional demands" "on its face.") See also *Simon & Schuster*, 112 S. Ct. at 511-12 (Court held invalid on its face a financial disincentive imposed on speech, where the restriction was "significantly over-inclusive" and was "not narrowly tailored").

In this case, the court correctly identified the statute's fundamental defect as facial in nature. The statute extended a burden on speech to all employees in the executive branch, including career civil servants at the lowest levels, and encompassed all articles and speeches, including those that had no connection to federal employment. It had no clearly identifiable "core" of constitutionally permissible applications. *Munson*, 467 U.S. at 965.

The government argues unconvincingly that the court of appeals was required to identify and define the circumstances in which there would exist a constitutionally adequate "nexus" between the subject matter of the expression or the character of the payor, and devise a remedy on that basis. Pet. Br. 37-38.⁴¹ As the court of appeals

⁴¹ Significantly, the government never proposed a "limiting construction" to the court of appeals, as that court pointed out. Pet. App. 14a. Instead, it waited until its petition for rehearing to suggest that the court should have limited its order to the "invalid

recognized, the drafting of an appropriate nexus test—one that prohibits receipt of compensation only where it would create a real or apparent conflict with federal employment—"would seem a purely legislative act" (Pet. App. 14a).

In fact, Congress has wrestled with the exact bounds of a nexus test in considering proposed legislation concerning government employees' receipt of "honoraria"; the House and Senate bills contained somewhat different job relatedness tests, together with different definitions of covered employees and prior reporting requirements.⁴² The statute itself contains an abbreviated nexus test with respect to "series" of appearances, speeches, and articles, while Congress enacted a far more elaborate nexus test to be applied to speech by faculty members and students at Defense Department schools. 10 U.S.C. 2161 note, Sec. 542(a)(1)-(4), 542(b); App. 1a-3a. And while criticizing the court of appeals' refusal to craft a test, the government in its brief suggests no specific alternative of its own.⁴³

applications" by articulating a nexus test. Pet. for Reh., filed May 13, 1993, at 10.

⁴² Compare H.R. 3341, 102d Cong., 1st Sess. (1991), which was passed by the House of Representatives on November 25, 1991, with S. 242, 102d Cong. 1st Sess. (1991) and accompanying report, S. Rep. No. 29, 102d Cong., 1st Sess. 8-14 (1991) (both appended to our brief to the court of appeals).

⁴³ Amicus Common Cause would have the Court insert a test that permits acceptance of "honoraria" only by employees who exercise "insufficient discretion" in the performance of their duties. CC Br. 25. That test would not only require the Court to engage in the purest form of legislative line-drawing, it would also run contrary to all available evidence as to legislative intent. Proposed bills to amend Section 501(b), which had the support of virtually all members of Congress, the administration and Common Cause itself, exempted all career government employees, regardless of grade or responsibilities. See *supra* at 33-34 n.28.

Common Cause (but not the government) further suggests that the lower court erred in striking the ban as to all executive

In short, the government's statement that "[i]f the nexus concept serves to identify the *unconstitutional* applications of Section 501(b), . . . it can also serve to identify the *constitutional* applications of Section 501(b)" (Pet. Br. 38, emphasis in original) is a gross oversimplification. The course the government suggests collides with the time-honored principle that a court is not to sustain the constitutionality of a statute by inserting words "that are not now there" for to do so "would be to make a new law, not to enforce an old one." *United States v. Reese*, 92 U.S. 214, 221 (1875). *Accord, Hill v. Wallace*, 259 U.S. 44, 70-71 (1922). *See generally Heckler v. Mathews*, 465 U.S. 728, 741-42 (1984) (and cases cited); *Blount v. Rizzi*, 400 U.S. 410, 419 (1971). The court of appeals' decision to leave the redrafting of Section 501(b) to Congress was, therefore, entirely reasonable.

branch employees on the additional ground that the plaintiffs did not have standing to challenge the ban with respect to senior career employees or political appointees within the executive branch. CC Br. 24-25. As an initial matter, we point out that one of the individual plaintiffs is a GS-16 career executive branch employee (*see supra* at 7 n.7). In any event, principles of standing determine whether a party has sufficient interests at stake to invoke the court's jurisdiction; Common Cause cites no authority for its suggestion that those principles preclude a court from issuing a remedy that inures to the benefit of persons not before the court. Indeed, an injunction striking a statute on its face routinely benefits persons who are not parties.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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July 1994

APPENDIX

APPENDIX

NATIONAL DEFENSE AUTHORIZATION ACT
FOR FISCAL YEAR 1993

Pub. L. 102-484, Div. A, Title V, 106 Stat. 2413
(Oct. 23, 1992), codified at 10 U.S.C. 2161 note

**Sec. 542. Authority for Military School Faculty
Members and Students to Accept Hono-
raria for Certain Scholarly and Academic
Activities.**

(a) **AUTHORITY TO ACCEPT HONORARIA.**—Notwithstanding the prohibition on the acceptance of honoraria contained in section 501(b) of the Ethics in Government Act of 1978, a faculty member or a student at a Department of Defense school specified under subsection (d) may accept an honorarium for an appearance, a speech, or an article published in a bona fide publication if such an appearance, speech, or article is customary for scholarly or academic activities normally associated with institutions of higher learning and if—

(1) the purpose of the appearance, or the subject of the speech or article, does not relate primarily to the responsibilities, policies, or programs of the school at which the individual is a faculty member or student;

(2) the appearance, speech, or article (including the individual's time in specific preparation for the appearance, speech, or article) does not involve the use of Government time, Government property, or other resources of the Government or the use of nonpublic Government information;

(3) the reason for which the honorarium is paid is unrelated to the individual's duties or

status as a member of the Armed Forces or employee of the Government or as a faculty member or student at a school specified in subsection (d); and

(4) the person offering the honorarium has no interests that may be substantially affected by the performance or nonperformance of the individual's duties as a member of the Armed Forces or an employee of the Government or as a faculty member or student at a school specified in subsection (d).

(b) **SPECIAL RULE CONCERNING SUBJECT MATTER.**—For purposes of subsection (a)(1), an appearance, speech, or article on a subject matter that is within an individual's academic or military specialty, in the case of a faculty member, or an individual's course of academic study, in the case of a student, shall not be considered to relate primarily to the responsibilities, policies, or programs of the school at which the individual is a faculty member or student if the preparation and presentation of the particular appearance, speech, or article is clearly outside of the individual's duties.

(c) **NONCOVERAGE OF HIGHLY PAID FACULTY MEMBERS.**—Subsection (a) shall not apply to acceptance of an honorarium by a faculty member who is employed in a position for which the rate of basic pay, exclusive of any locality-based pay adjustment under section 5302 of title 5, United States Code (or any comparable adjustment pursuant to interim authority of the President), is equal to or greater than the rate of basic pay payable for Level V of the Executive Schedule.

(d) **COVERED SCHOOLS.**—(1) This section applies with respect to faculty members and students at any of the service academies and at any professional military school operated by the Department

of Defense that is designated by the Chairman of the Joint Chiefs of Staff to be covered by this section.

(2) For purposes of paragraph (1), the term "service academies" means—

- (A) the United States Military Academy;
- (B) the United States Naval Academy; and
- (C) the United States Air Force Academy.

(e) **HONORARIUM DEFINED.**—For purposes of this section, the term "honorarium" means a payment of money or anything of value for an appearance, a speech, or an article (including a series of appearances, speeches, or articles).

(f) **MAXIMUM AMOUNT OF HONORARIUM.**—The amount of any honorarium accepted under this section shall not exceed the usual and customary fee for the appearance, speech, or article for which the honorarium is paid, up to a maximum of \$2,000.

(g) **EFFECTIVE DATE.**—This section shall apply with respect to any honorarium for an appearance or speech made, or an article published, on or after the date of the enactment of this Act.

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No. 93-1170

Supreme Court, U.S.

FILED

SEP 1 1994

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

NATIONAL TREASURY EMPLOYEES UNION, ET AL.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

REPLY BRIEF FOR THE PETITIONERS

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In attacking the honorarium ban, respondents invoke a stringent standard of First Amendment review by magnifying the ban's impact on speech and understating the deference due to Congress's judgment about the dangers caused by the payment of honoraria to Executive Branch employees. At the same time, respondents acknowledge (Br. 14, 45-46) that the sweeping remedy ordered by the court of appeals is not necessary to vindicate their constitutional rights. Respondents' arguments on the merits do not justify even a partial invalidation of the honorarium ban. In light of their concession about the unneeded breadth of the court of appeals' remedy it is clear, in all events, that the judgment below cannot stand.

(1)

A. The Merits. Respondents acknowledge (Br. 24) that, under this Court's precedents, the regulation of employee speech is judged under the balancing test announced in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). Yet respondents would skew the application of that balance in two ways. First, they attach greater weight than is justified to the employees' side of the scales for a limitation, not of speech, but of compensation for speech. Second, they give insufficient weight to Congress's determination about what honoraria regulations are required to prevent abuses and appearances of abuses by Executive Branch employees.

1. *The honorarium ban does not prohibit speech*

a. Respondents argue that the honorarium ban "significantly burdens the exercise of First Amendment rights," because it makes it "more expensive" and "more difficult" for Executive Branch employees to write or speak publicly and because it "saps incentive" to do so. Resp. Br. 12, 16. They contend (Br. 16, 21-22) that under *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991), *Meyer v. Grant*, 486 U.S. 414 (1988), and *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988), the ban's burden on speech cannot be deemed modest in the *Pickering* balance.

The economic impact of the ban on the receipt of honoraria by employees for some types of speech concededly brings First Amendment interests into play. But these interests must be placed in context. The ban does not prohibit or punish *any* writing or speaking by government employees. Nor does it prevent employees from recovering their actual and necessary expenses when they write articles, give speeches, or make appearances. Gov't Br. 16. This is not a case like *Simon & Schuster*, which involved a law that required authors

who were members of the general public to surrender all income from certain kinds of works. The honorarium ban applies only to persons who are employed by and who draw salaries from the federal government. Respondents, for example, are all "currently employed full-time" in executive agencies and departments. Pet. App. 60a. Respondents thus err in relying on decisions that address financial burdens on the speech of private citizens. See Resp. Br. 16, 22. Respondents are not solely, or presumably even primarily, dependent for their livelihood on their income from writing or speaking, and that factor is important in evaluating the impact that the honorarium ban has on their freedom to speak.

It is far from clear, for example, that the respondents themselves regard the financial rewards of writing as their main incentive. One of the respondents attested that "[r]elative to my government salary, I did not earn a great deal of money from this endeavor—no more than \$3,000 annually," and "would probably continue to do so even without pay." J.A. 78. That author was hindered, however, because his preferred place of publication, the Washington Post, chose not to accept "donated" articles. *Ibid.* The government is not accountable for such publication policies, or for the actions of professional bodies that, for reasons of their own, "strongly discourage or prohibit their members from writing without compensation." Resp. Br. 9. In any event, the honorarium ban need not constitute a deterrent even in that situation because it permits an honorarium to be paid "on behalf of the * * * employee to a charitable organization." 5 U.S.C. App. 501(c) (Supp. IV 1992).

b. Nor does the honorarium ban warrant "especially close scrutiny," despite the fact that it prohibits no speech, because it "target[s] and single[s] out speech for disfavored treatment." Resp. Br. 17. Respondents again

rely here (*ibid.*) on cases involving regulation of speech by the public at large. *E.g.*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). But this Court developed the *Pickering* balancing test for judging government employees' constitutional claims in order to gauge regulations that targeted and singled out speech. 391 U.S. at 568; see *Connick v. Myers*, 461 U.S. 138, 142 (1983). And the Court has applied that test in rejecting an attack on the Hatch Act, which operated exclusively to restrict the exercise of political rights at the core of the First Amendment. *CSC v. National Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973). In none of those cases was the regulation's focus on speech a reason in itself for increasing the weight of the employees' interest.

In any event, respondents' assertion (Br. 18) that "there is no characteristic to the writing and speaking activities of career employees that makes them 'special' * * * when compared to other outside income-producing activities" is incorrect. Honoraria for appearances, speeches, and articles are particularly prone to abuse because the activities that occasion those payments may easily be the product of little or no genuine effort by the employee. Gov't Br. 19. Congress had ample historical basis for concluding that the problems of abuse, and perception of abuse, associated with the receipt of honoraria by government employees for appearances at conventions and similar activities warranted particular focus, as compared with the issues raised when employees earn extra money by taking a second job. See pp. 8-9, 12, *infra*. The First Amendment does not prevent Congress from limiting its reform attempts to activities that have actually caused problems. "[R]eform may take one step at a time, addressing itself to the phase of the

problem which seems most acute to the legislative mind." *Buckley v. Valeo*, 424 U.S. 1, 105 (1976) (*per curiam*); see also *id.* at 105 n.143.

Respondents also seek to increase the weight of their First Amendment interests by noting (Br. 18-20) that the honorarium ban permits compensation for certain forms of expression, such as the writing of books, poetry, or works of fiction. It would, however, be odd if the Constitution required Congress to ban compensation for *all* speech in order to prevent receipt of payments in situations where abuses have occurred. And it is equally odd for respondents to argue (Br. 19-20) that the honorarium ban is particularly burdensome because it may require some governmental review of the content of the expression (*i.e.*, to determine whether the expression is fiction or nonfiction, a book or an article, a speech or a recitation of poetry). The honorarium ban is far less concerned with the content of speech than is normally true in a *Pickering* case. In the typical case, the public employer has imposed discipline on an employee precisely *because* of the nature and meaning of what the employee has said. Those situations pose a far greater threat of censorship than the honorarium ban. The honorarium ban is not intended to suppress any speech, let alone speech of a particular content or viewpoint. In sum, the ban's focus on *payment* rather than speech, its viewpoint-neutral character, and its inapplicability to practices that had not been areas of abuse all serve to minimize its intrusion on First Amendment values.

2. *The honorarium ban is sufficiently justified and properly tailored*

a. Respondents contend (Br. 23-28) that the deference due to congressional judgments expressed in *United Public Workers v. Mitchell*, 330 U.S. 75, 101 (1947), is outmoded in light of more recent decisions (Br. 27).

Respondents also appear to take the view that the absence of explicit legislative history explaining the honorarium ban's application to Executive Branch employees requires "more * * * rigorous [review] than that usually applied in the public employment context" (Br. 26).

Those claims are mistaken. As recently as last Term, a plurality of this Court cited *Mitchell* with approval, noting that the Court has

consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large. Few of the examples we have discussed [earlier in the opinion] involve tangible, present interference with the agency's operation. The danger in them is mostly speculative. One could make a respectable argument that political activity by government employees is generally not harmful, see *Public Workers v. Mitchell*, *supra*, 330 U.S. at 99, * * * [b]ut we have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential.

Waters v. Churchill, 114 S. Ct. 1878, 1887 (1994) (plurality opinion).¹

¹ Respondents rely (Br. 24, 37 n.33) on *Churchill's* statement that "[i]n many such situations the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished." 114 S. Ct. at 1887 (plurality opinion). The "situations" to which the opinion alluded are employer efforts to sanction speech *because* of its content. See

The deference due to Congress's judgment is certainly not unlimited; Congress must act reasonably. But legislation in this area is not unconstitutional merely because the legislative history does not contain an explicit discussion of why Congress chose to draw the precise lines that it did. See *Buckley v. Valeo*, 424 U.S. at 83 (upholding reporting thresholds in campaign finance disclosure laws even though "there is little in the legislative history to indicate that Congress focused carefully on the appropriate level at which to require recording and disclosure"). Nor are respondents on firm ground in invoking (Br. 37) the burden of justification described in the plurality opinion in *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2470-2471 (1994). That case dealt with direct regulation of speech in the private sector; it did not address any issue relating to employee speech, let alone regulation only of an employee's outside compensation for such speech.

b. In this case, the record on which Congress relied included reports of two prestigious ethics panels that recommended a ban on honoraria in all three branches. See Gov't Br. 3-5 & n.11, 19-20 (citing *Fairness for Our Public Servants: The Report of the 1989 Commission on Executive, Legislative and Judicial Salaries* (Dec. 1988) (*Quadrennial Commission Report*); *To Serve With Honor: Report of the President's Commission on Federal Ethics Law Reform* (Mar. 1989) (*Wilkey Commission Report*)). Respondents contend that these

ibid., citing *inter alia*, *Connick v. Myers*, 461 U.S. at 152. Here, the government is not prohibiting speech, but payment for speech, and it is not concerned with speech of any particular content. Accordingly, the proper approach is to give "deference to government predictions of harm used to justify restriction of employee speech." *Churchill*, 114 S. Ct. at 1887 (plurality opinion).

reports "merely recommended an extension to all three branches of a prohibition on acceptance of the type of honoraria historically subject to abuse" (Br. 13), that they used narrow definitions of honoraria that did not reach all of the expression covered by the ban as enacted (Br. 34), and that "[t]he all-encompassing definition of 'honorarium' contained in Section 501(b) goes further than anything contemplated by either commission" (Br. 35). Those claims are incorrect.

The Quadrennial Commission and the Wilkey Commission recommended, not only that honoraria be banned in all three branches, but also that

honoraria should be defined so as to close present and potential loopholes such as receipt of consulting, professional or similar fees; payments for serving on boards; travel, sport, or other entertainment expenses not reasonably necessary for the appearance involved; or any other benefit that is the substantial equivalent of an honorarium.

Quadrennial Commission Report 24 (J.A. 234); *Wilkey Commission Report* 36 (J.A. 254). The Wilkey Commission added, in support of its "Recommendation 6" that "federal employees in all three branches be prohibited from receiving honoraria," the suggestion that:

To curtail the risk that individuals will find a way to circumvent these restrictions, the bar on honoraria necessarily needs to extend both to activities related to an individual's official duties and to other activities. * * *

We recognize that banning honoraria would have a substantial financial cost to many officials. We feel strongly, however, that the current ailment is a

serious one and that this medicine is no more bitter than is needed to cure the patient.

Wilkey Commission Report 33, 36 (J.A. 249, 254). The Wilkey Commission rejected the view that the honorarium ban should be tied to a pay raise for all federal employees:

[W]e did not see, in good conscience, how we could suggest holding off on the adoption of our recommendations until pay levels were raised to a more adequate level. * * * [W]e regard the current state of affairs as to honoraria in particular as unacceptable in the extreme, and [we] believe that we cannot wait until an unspecified date in the future to end this harmful practice.

Wilkey Commission Report 38 (J.A. 257).

In enacting the honorarium ban, Congress was justified in relying on these reports, as well as on its own familiarity with federal employment and the problems occasioned by the receipt of honoraria (see Gov't Br. 32). The consensus of the Quadrennial and Wilkey Commissions about honoraria drew on the substantial experience of the members of those bodies with issues of ethics and appearances in federal employment.² Moreover, a 1992 report issued by the

² These Commissions included as members individuals with significant experience in public life. The Quadrennial Commission was chaired by former (and present) White House counsel Lloyd N. Cutler and included (among others) the Honorable Thomas F. Eagleton and the Honorable Charles McC. Mathias. *Quadrennial Commission Report* at iii. The Wilkey Commission was chaired by Judge Malcolm R. Wilkey and included (among others) former Attorney General Griffin B. Bell, Mr. Cutler, former White House counsel Fred Fisher Fielding, and Admiral R. James Woolsey. *Wilkey Commission Report* (unnumbered introductory page).

General Accounting Office (GAO Report) documents what Congress must have known through its own oversight activities: that prior federal regulations geared to the content of articles and the identity of the payors of honoraria were susceptible to misapplication or abuse.³ Contrary to respondents' claim (Br. 28), these reports give significant "credibility" to the rationales supporting the honorarium ban: the interest in promoting integrity and the appearance of integrity; the need to prevent circumvention of rules; and the desire to minimize administrative burdens.

c. Respondents argue that the honorarium ban is broader than necessary (Br. 28-31), and that, because it has exceptions that permit some compensated speech, the ban is also fatally underinclusive (Br. 29) and indefensible as a "uniform" prophylactic rule (Br. 38-40). None of those submissions is correct.

First, the question whether it was appropriate to apply the ban where neither the speech nor the payment has a nexus to government employment (Resp. Br. 29) is not an issue easily subject to proof. Respondents argue (Br. 33)

³ See Gov't Br. 22-23. Respondents downplay (Br. 42 n.38) the conclusions of the GAO report by noting that it found "few instances of questionable conduct." But the GAO's discovery of several instances of questionable conduct in a survey of 11 agencies in a discrete period supports the inference that a wider survey would have discovered much more questionable conduct. The GAO report also undermines respondents' suggestion (Br. 30) that Congress could rely on existing "statutes and regulations that effectively forbid [employees] from engaging in any conduct—paid or unpaid, and expressive or non-expressive—that could give rise to impropriety or the appearance of impropriety." The GAO report makes clear that while those provisions were designed to prevent improper acts or appearances, they did not always do it "effectively."

that "the legislative record does not support the concern * * * that employee acceptance of 'honoraria' with no nexus to employment threatens integrity or creates a public perception of impropriety." At issue in this case, however, is whether Congress could make a "reasonable prediction[]" that those problems might frequently arise. *Waters v. Churchill*, 114 S. Ct. at 1887 (plurality opinion). The public could readily have suspicions, for example, about the receipt of honoraria by certain employees, such as prosecutors and procurement officials, regardless of the specific circumstances of the speech or payment. Thus, even respondents do not dispute the court of appeals' view that the receipt of any honorarium by an employee of the Internal Revenue Service could generate understandable "anxiety" in the public. Pet. App. 10a. On the other hand, the source of some honoraria will be a cause of concern regardless of the duties of the payee. Honoraria paid by a general circulation newspaper, for example, can be a source of concern if paid to any employee of a government agency that the publication has under investigation or scrutiny. The relevant issues for Congress are how much of the workforce and what types of activity should be included in order to alleviate public concern and minimize the risk of improprieties. In such matters of degree, where public employees are involved, this Court has consistently deferred to Congress's judgment. *United Public Workers v. Mitchell*, 330 U.S. at 101-102; Gov't Br. 26-27.

Second, while "underinclusiveness" may, in some cases, "diminish the credibility of the government's rationale for restricting speech," *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2044 (1994), here, the explanation for the exceptions from the honorarium ban (Resp. Br. 18-20, 29) does not have that effect: Congress simply had no reason to ban compensation that it did not believe

posed any significant problem. Indeed, the Wilkey Commission had stated that a "flat ban on outside earned income by all federal employees" would be "unnecessary and too harsh." *Wilkey Commission Report* 38 (J.A. 258). The Commission also indicated that "as we conceive of it, the bar on receipt of honoraria would not prohibit payment for continuing activities such as teaching academic, for credit, courses, or publication of a book through a recognized publishing house to be distributed through usual and customary channels." *Wilkey Commission Report* 36 (J.A. 254). Congress ultimately followed both suggestions: it did not prohibit all additional employment by federal employees, and it left open the possibility of earning honoraria for a "series" (i.e., a continuing activity, see Gov't Br. 33-34) of appearances, speeches, or articles that are unrelated to federal employment. 5 U.S.C. App. 501(a) (Supp. IV 1992) (outside earned income limitation for most senior Executive Branch employees); 5 U.S.C. App. 505(3) (Supp. IV 1992) (exclusion of "series"). Those limitations indicate respect for the First Amendment interests of employees; they are certainly not a reason to invalidate the ban. See Gov't Br. 29 n.24.

Third, the honorarium ban is a legitimate prophylactic measure even though it applies differently in military contexts than in civilian ones, does not ban all outside compensation, and applies a more permissive rule to a "series" of appearances, speeches, or articles than it does to single-shot instances of paid expression. Resp. Br. 38-39. The exceptions do not make the ban "grey" (Resp. Br. 38); they make it tailored. And, contrary to respondents' assertion (Br. 39-40), the ban does reduce administrative costs, by limiting (although not eliminating) case-by-case judgments about the propriety of honoraria. By requiring some case-by-case judgments to

be made about honoraria while eliminating many, Congress struck a reasonable balance.

In arguing that the government has not justified the use of prophylactic rules in regulating honoraria, respondents are compelled to rely (Br. 40-42) on cases addressing the regulation of speech of private citizens. See *Turner Broadcasting, supra* (cable systems); *NAACP v. Button*, 371 U.S. 415 (1963) (civil rights group); *Edenfield v. Fane*, 113 S. Ct. 1792 (1993) (commercial speech); *Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084 (1994) (same). Those cases are inapposite here, because "constitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by the government as sovereign"; the government has "extra power" to attain "its goals [as employer] as effectively and efficiently as possible." *Churchill*, 114 S. Ct. at 1887, 1888 (plurality opinion).

B. The Remedy. Respondents do not defend the breadth of the court of appeals' ruling as necessary to safeguard their constitutional rights; indeed, they state "that adherence to the precise remedial formulation adopted by the court of appeals is not, as a practical matter, crucial to vindication of respondents' First Amendment rights." Resp. Br. 45.

1. Respondents acknowledge that their objective was to secure a ruling that permitted them to receive compensation for expression that does not have a "nexus" to federal employment, e.g., "writing and speaking that does not create either a real or apparent conflict with their federal employment." Resp. Br. 45. That objective, respondents concede (Br. 45-46), could "be achieved by a remedy similar to the one urged by the government—by holding the [honorarium] ban invalid as applied to respon-

dents' writing and speaking activities, which have no nexus to their federal employment."

If the absence of a "nexus" test is a constitutional flaw, respondents' concession makes clear that the remedy imposed by the court of appeals is insupportably overbroad. Because there is no need, even on respondents' theory, to invalidate all applications of the honorarium ban to Executive Branch employees in order to protect respondents' constitutional rights, the court of appeals' remedy must be reversed.⁴

2. Respondents argue that the court of appeals' remedy, while unnecessary, is nevertheless "defensible." Resp. Br. 46. The only effect of the broad invalidation ordered by the court of appeals, however, is to free from the constraints of the honorarium ban compensation that concededly could constitutionally be barred, i.e., speech that does have a nexus to federal employment. It would be surprising if this Court's cases required that strange result, and, in fact, none of them does.

The relief ordered by the court of appeals would be justified only if respondents had met the requirements of the Court's overbreadth doctrine. See Gov't Br. 37, 41-43. Respondents, however, on whom the burden to demonstrate unconstitutional overbreadth lies, make no

⁴ A remedy tailored to the violation, if one is found, would protect those payments where neither the speech nor the payor has a nexus to federal employment. In addition, it would apply only to respondents and the members of the plaintiff class, not (as the court of appeals held) to all Executive Branch employees. See Gov't Br. 36 n.27. The class consists of all federal employees in the Executive Branch below grade GS-16 who would be able to receive honoraria but for the prohibition contained in 5 U.S.C. App. 501(b) (Supp. IV 1992). J.A. 124-125. Higher level executive officials, whose claims may stand on a different constitutional footing, should not automatically be treated in the same way.

effort to show that the purported "overbreadth" of the honorarium ban is "not only * * * real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Instead, they argue that the honorarium ban has no "core" of constitutionally valid applications and has a large set of invalid applications. Resp. Br. 46, citing *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 965 (1984). But this is a case in which there is a clearly identifiable and substantial "core" of concededly valid applications of the honorarium ban: payment for appearances, speeches, and articles with a nexus to federal employment. And, given the procedure afforded in the statute to obtain advisory opinions, see Gov't Br. 42-43, the continued enforcement of this core presents no "risk of chilling free speech," which is the primary justification for permitting a "facial attack." *Joseph H. Munson Co.*, 467 U.S. at 968.

Nor is the statute here so significantly overinclusive that partial invalidation was not feasible, if, as the court of appeals held, honoraria can be prohibited only where there is a nexus to federal employment. Resp. Br. 46, citing *Simon & Schuster*, 112 S. Ct. at 511-512. If the constitutional litmus test is the presence of such a nexus, the court could have based its remedy on that precise principle, by holding the ban unconstitutional as applied to honoraria for appearances, speeches, and articles that have no nexus. If a nexus test is constitutionally required, there is no merit to respondents' endorsement (Br. 46-47) of the court's view that application of a nexus test would be a "purely legislative act."⁵

⁵ Respondents' criticism of the government for failing to propose a "limiting construction" until seeking rehearing is

In sum, if there is a constitutional defect in the honorarium ban, it did not justify the overly broad remedy ordered by the court of appeals. Because that remedy violates the cardinal principle that a court should seek to invalidate no more of a statute than is necessary to protect the constitutional rights at stake, the remedy in this case should in all events be reversed.

Respectfully submitted.

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SEPTEMBER 1994

without merit. Resp. Br. 46 n.41. Not until the rehearing stage had the court of appeals adopted its theory that the honorarium ban was invalid for want of a nexus—and that the ban must therefore fall in *all* its applications to Executive Branch employees. And respondents' claim (Br. 47) that "the government in its brief suggests no specific alternative of its own" is simply wrong; our brief indicated that if the court were reluctant to apply its own constitutional test to fashion a remedy, it could alternatively have invoked the statutory nexus test applicable to a "series" of appearances, speeches, or articles. Gov't Br. 38 & n.28.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

UNITED STATES OF AMERICA, *et al.*,
Petitioners,
v.

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**BRIEF OF AMICUS CURIAE COMMON CAUSE
IN SUPPORT OF PETITIONERS**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1170

UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**BRIEF OF AMICUS CURIAE COMMON CAUSE
IN SUPPORT OF PETITIONERS**

INTEREST OF AMICUS CURIAE

Common Cause is a non-profit, non-partisan membership corporation organized under the laws of the District of Columbia.¹ Its principal objective is to further the interests of its 270,000 members in honest and responsible government. Common Cause seeks to promote these interests through reform of government and the political process.

Common Cause has a longstanding interest in laws promoting ethics in government. Common Cause actively supported the enactment of the Ethics Reform Act of

¹ All parties to this case have consented to the filing of this brief. Copies of the written consents of the parties are on file with the Clerk of the Court.

1989. Representatives of Common Cause testified before the commissions appointed to recommend reforms of the ethics laws and before the relevant committees of Congress during their consideration of the 1989 legislation. Common Cause has appeared as an amicus curiae to support the constitutionality of the Ethics Reform Act of 1989 at virtually every stage of this litigation.

Common Cause believes that effective regulation over government employees' acceptance of honoraria is critical to maintaining (or more accurately to resuscitating) the public's confidence in and trust of their government, and to the integrity of our governmental processes.

BACKGROUND

Title VI of the Ethics Reform Act as amended ("the Act") prohibits the receipt of honoraria for any appearance, speech or article by any Member, officer, or employee of the United States government. This ban on honoraria does not prohibit any federal official from making a speech or appearance, or from publishing an article.² It provides only that a federal employee may not receive any payment for such activities other than reimbursement for travel expenses. 5 U.S.C. app. § 505(3) (Supp. IV 1992).

A group of executive branch employees, all grade GS-15 or below, filed suit to enjoin enforcement of the honoraria ban, as did two unions representing such employees. The district court denied a preliminary injunction in an unpublished opinion, and the court of appeals affirmed. 927 F.2d 1253 (D.C. Cir. 1991). The district court subsequently held that the honoraria ban was un-

² Pub. L. No. 101-194, § 601(a), 103 Stat. 1760 (1989), codified at 5 U.S.C. app. § 501(b) (Supp. IV 1992). The honoraria provisions of the 1989 Act did not originally cover the Senate and its employees. Subsequent legislation extended the honoraria ban to all government employees, including Senators and their staff. Pub. L. No. 102-90, 105 Stat. 447, 450 (1991).

constitutional, not only as to lower-level federal employees but as to all executive branch employees of all grades. 788 F. Supp. 4 (D.D.C. 1992). The court of appeals affirmed by a 2-1 vote. 990 F.2d 1271 (D.C. Cir.), *opinions on denial of rehearing*, 3 F.3d 1555 (1993).

SUMMARY OF ARGUMENT

The ban on the receipt of honoraria by all federal employees, even lower-level executive branch employees, was part of a careful and deliberate choice by Congress to guard against conflicts of interest and the appearance of impropriety. Most federal laws governing ethics have applied generally and uniformly to all employees of all three branches of government. The Act's history demonstrates that the executive and legislative branch commissions that proposed the bill understood and intended that it would ban honoraria absolutely to all employees in all three branches. Congress explicitly adopted the judgments of these commissions, as did the President. The policy judgment that the predecessor statutes had failed and an honoraria ban was necessary has been amply justified by evidence that regulations short of an absolute ban were insufficient to prevent real and apparent abuses of government office and were enforced unevenly and unfairly. Public distrust of government is a very real and serious threat to the legitimacy of our institutions, and the honoraria ban was a reasoned response to that threat.

This Court's holdings on the authority of the government in its role as an employer justify a prophylactic ban on receipt of honoraria by its employees. The court below failed to apply the balancing test this Court announced in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), for determining the limits the government may impose on its employees' speech. Under this test, the government's interests support the honoraria ban.

Even if the appropriate test were whether the statute is unconstitutionally overbroad, the honoraria ban would

still be constitutional. As the court below correctly conceded, there are many employees at all levels of government as to whom a total ban on honoraria is appropriate. The drastic remedy of holding a statute facially invalid as to all executive branch employees is inappropriate where, as here, there are numerous instances in which the statute can be constitutionally applied.

Determining which federal employees should be prohibited from receiving honoraria is a quintessential example of a policy judgment reserved by the Constitution to the political branches of government. The Constitution cannot compel different treatment of the different branches of government, or different treatment of different levels of employees within a branch.

The plaintiffs here do not have standing to challenge the honoraria ban as applied to senior-level executive branch employees, and an absolute ban is necessary for such officials. Even if, contrary to the arguments above, the honoraria ban is invalid as to some of the plaintiffs, the appropriate remedy would be to enjoin its enforcement only against employees who do not exercise discretionary authority.

ARGUMENT

I. THE DECISION TO APPLY THE HONORARIA BAN TO EXECUTIVE BRANCH EMPLOYEES WAS A DELIBERATE POLICY CHOICE BY THE POLITICAL BRANCHES.

The honoraria provision was not, as has been suggested by the various plaintiffs below and echoed in the opinion of the court of appeals, a chance and purposeless addition to the laws. Rather, it was part of a careful step-by-step effort by the political branches to protect against corruption and to ensure the appearance as well as the reality of impartiality in the federal government.

A. The Ban on Honoraria in the 1989 Act Was Neither Accidental nor Inadvertent.

Federal law has long recognized that employees at all levels of government can harm the public interest if they are subject to improper financial influence. Since the 19th century, conflict-of-interest statutes have prohibited all government employees from acting for the government in business transactions in which they have a financial interest. As this Court recognized,

The moral principle upon which the statute is based has its foundation in the Biblical admonition that no man may serve two masters, Matt. 6:24, a maxim which is especially pertinent if one of the masters happens to be economic self-interest. Consonant with this salutary moral purpose, Congress has drafted a statute which speaks in very comprehensive terms. Section 434 is not limited in its application to those in the highest echelons of government service[.]³

³ *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 549 (1961) (construing 18 U.S.C. § 434, a predecessor of 18 U.S.C. § 208 (1988), which applied to any "officer or agent of the United States").

Similarly, all executive branch employees have long been subject to the prohibitions against private compensation for government service and against bribery, graft, and representation of private parties in matters affecting the government.⁴

As part of these general prohibitions regulating the conduct of executive branch employees, federal regulations have long set forth general restrictions on the receipt of honoraria. Under these regulations, executive branch employees could not receive honoraria for speeches or articles that focus specifically on the employing agency's policies, create a conflict of interest, or interfere with the employee's official duties. These prohibitions, extending back decades, applied to all executive branch employees, regardless of grade or pay.⁵

Thus, when in the wake of the Watergate era scandals Congress began the task of erecting prohibitions against the receipt of honoraria, it began its task against the backdrop of public corruption laws that were applied broadly. When Congress enacted in 1974 the first statutory limitations on the receipt of honoraria for an article, speech or appearance, it not surprisingly chose to apply the restrictions to every "elected or appointed officer or employee of any branch of the Federal Government." Under this law, the amount of any honorarium was limited to \$1,000 (plus reimbursement for actual travel expenses), with an aggregate limit of \$15,000 in any calendar year.⁶ However, it departed from the prior regulations on one crucial point. Unlike the regulations, which were limited in scope by a subject matter test, the honoraria statutes applied to all speech, articles or appear-

⁴ See *Bribery, Graft and Conflicts of Interest: Report of the Judiciary Committee*, S. Rep. No. 2213, 87th Cong., 2d Sess. (1962), reprinted in 1962 U.S.C.C.A.N. 3852, 3856-60 (discussing 18 U.S.C. §§ 201, 203, 205, 209 and their predecessor statutes).

⁵ See 33 Fed. Reg. 12,487 (1968); 5 C.F.R. § 735 (1992).

⁶ See Pub. L. No. 93-443, § 101(f)(1), 88 Stat. 1268 (1974).

ances without reference to the relationship between the subject matter and the official's duties. Two years later, the honoraria limits were raised to \$2,000 per speech and \$25,000 per year, and civil rather than criminal penalties were proscribed, but the restrictions continued to apply to government employees at all levels in all three branches and to all speeches, articles or appearances regardless of the subject matter or the identity or interests of the audience.⁷

The problems caused by the receipt of honoraria for articles, speeches and appearances were described in reports of special ethics panels in the House and Senate in 1977, which recommended the adoption of even tighter restrictions for members of Congress. Both panels recognized that polls and public surveys showed rising public cynicism over the practice of honoraria, and noted the inherent potential for conflicts of interest. The House adopted, as an internal rule applicable to House Members, a \$750 limit on honoraria for any single speech, an annual limit on outside earned income, and regulations concerning travel expenses.⁸

The patchwork of statutes, regulations, and legislative rules in effect before 1989 proved insufficient to curtail

⁷ Pub. L. No. 94-283, 90 Stat. 475, 494 (1976). The aggregate limit was later removed. See Pub. L. No. 97-51, 95 Stat. 958, 966 (1981). The monetary ceiling on honoraria for a speech or article is no longer in effect. The \$2,000 limit was repealed by legislation imposing the complete ban on honoraria at issue in this case. See Pub. L. No. 101-194, § 601(a), 103 Stat. 1760 (1989) (conforming amendments) (executive and judicial branches and House of Representatives); Pub. L. No. 102-90, 105 Stat. 447, 450 (1991) (Senate). Thus, in light of the judgment of the courts below, currently there are no statutory limits on the honoraria that an executive branch employee can accept.

⁸ *Financial Ethics: Communication from the Chairman, Comm. on Admin. Review*, H.R. Doc. No. 73, 95th Cong., 1st Sess. 9-12 (1977); *Senate Code of Official Conduct: Report of the Special Comm. on Official Conduct*, S. Rep. No. 49, 95th Cong., 1st Sess. 8-9, 37-40 (1977). The House rule was later revised.

the abuses created by outside income and to promote public confidence in the integrity of government. In 1989, President Bush recognized the continuing problem in the executive branch and provided a partial remedy, an executive order prohibiting all presidential appointees in the executive branch from receiving any outside earned income (including any honoraria).⁹ In the legislative branch, the limits on honoraria also proved inadequate. Honoraria received by members of the House and Senate fueled the public perception that special interests were engaging in influence-peddling. Sizeable honoraria for congressional staff members also created the appearance of impropriety in the operations of the government. For instance, the press gave widespread coverage to honoraria received by staffers—including \$28,000 in honoraria pocketed during a two-day barnstorming trip to Oklahoma and Texas by the top staff aides to House speaker Jim Wright and minority leader Robert Michel.¹⁰

Newspaper articles and editorials across the country reflected the public view of honoraria as “legalized bribery,” “legislative prostitution,” “shameless pandering to special-interest payoffs,” “bag money,” “lobbyist payola,” “appalling,” a “disgrace” and a “low-life prac-

⁹ See Executive Order No. 12,674 (1989), 3 C.F.R. 215 (1990) (codified as 5 U.S.C. § 7301 Part I (Supp. IV 1992)).

¹⁰ See Richard Stengel, *Morality Among the Supply-Siders*, Time, May 25, 1987, at 18 (listing ethical lapses by executive branch officials, including improper payments from private parties); Charles R. Babcock, *For Two in the House, A Fast \$28000 in fees*, Wash. Post, Oct. 6, 1989, at A20; see also John E. Yang, *Honoraria, Bounty of Special Interest Groups, Trickle Down to Some Congressional Staffers*, Wall St. J., May 26, 1989, at A12; Charles R. Babcock, *Interest-Group Honoraria Plentiful for Top Hill Aides*, Wash. Post, Oct. 6, 1989, at A1; Carol Matlack, *Gravy Train*, Nat'l J., Jan. 28, 1989, at 257; Dan Vukelich, *Honorarium Ban Would Hit Hill Staff, Officers in Wallet*, Wash. Times, Feb. 7, 1989, at A6; Kimberly Mattingly, *Staff Plays Honoraria Game Too*, Roll Call, Jan. 22, 1989, at 1.

tice.”¹¹ Against this background, the political branches began again the task of overhauling the honoraria laws.

To assist in this effort, Congress and the President appointed a series of blue-ribbon panels to study ethics law reform. After taking extensive testimony, each of those panels specifically recommended a complete ban on the receipt of all honoraria by all government personnel. The Quadrennial Commission concluded that the “potential for impropriety in the present rules governing honoraria was so high that the practice of receiving honoraria should be eliminated.” It “strongly recommend[ed] that the practice of accepting honoraria in all three branches be terminated by statute[.]”¹²

Similarly, the President's Commission on Federal Ethics Law Reform urged legislation to “ban the receipt of honoraria by all officials and employees in all three branches of government.”¹³ The President's Commission concluded that a restriction on honoraria limited by a relational test to the official's duties would be insufficient because of the risk of circumvention.¹⁴

Finally the fourteen members of the House Bipartisan Task Force on Ethics agreed that “honoraria [should] be abolished for all officers and employees of the govern-

¹¹ Quoted in Report of 1989 Comm'n on Executive, Legislative, and Judicial Salaries: Hearings Before the Senate Comm. on Governmental Affairs, 101st Cong., 1st Sess. 30, 32 (1989) (statement of Fred Wertheimer, President of Common Cause).

¹² Comm'n on Executive, Legislative and Judicial Salaries, *Fairness For Our Public Servants* 24 (Dec. 1988).

¹³ President's Comm'n on Federal Ethics Law Reform, *To Serve With Honor* 35-36 (Mar. 1989) (hereinafter *To Serve With Honor*).

¹⁴ *To Serve With Honor*, Recommendation 6, 33-37 (“[t]o curtail the risk that individuals will find a way to circumvent these restrictions, the bar on honoraria necessarily needs to extend both to activities related to an individual's official duties and to other activities”).

ment[.]”¹⁵ In language echoing that of the President’s Commission, the Bipartisan Task Force warned against “circumvent[ion]” of the rules and urged that the honoraria ban extend to topics both related and unrelated to the official’s duties.

The panels’ recommendations reflected a number of important and interrelated judgments. First, the panels affirmed that the receipt of honoraria for articles, speeches and appearances undermined public confidence in fair government and created an appearance of impropriety, if not actual impropriety itself.

Second, the various reports, especially that of the President’s Commission, explained that there existed an extreme and unacceptable lack of uniformity across the branches of government with respect to the honoraria laws and that the laws and rules applicable to the legislative branch were far too lax.¹⁶ The panels determined that the potential for abuse—although differing in degree—existed at all levels of government employment, from the highest to the lowest. The commissions concluded that if the prohibition against the receipt of honoraria was to be successfully applied to Congress, as they all believed it had to be, then an equally rigorous ban would also have to be applied consistently to all three branches. This conclusion was based on considerations of fairness and of political practicality.

Third, the panels recognized the historical antecedents of the honoraria rules, and limited the reach of their proposed rules to articles, speeches, and appearances in the belief that the restrictions should be tailored to the problem at hand. Finally, the commissions concluded

¹⁵ House Comm. on Rules, 101st Cong., 1st Sess., *Report of the House Bipartisan Task Force on Ethics on H.R. 3660* 14. (Comm. Print 1989) (hereinafter *Bipartisan Task Force Report*). This report specifically noted that its proposed restrictions would affect “rank-and-file employees of the executive branch[.]” *Id.* at 13.

¹⁶ *To Serve With Honor* at 35-36.

that a broad prophylactic ban applicable to topics both related and unrelated to an employee’s employment was necessary to prevent the risk of abuses and the appearance of corruption and to curtail the risk that honoraria payers and government employees would circumvent the rules and that agencies would apply subjective rules in an uneven fashion.¹⁷

These recommendations served as the basis for Congress’ and the President’s decision to adopt the honoraria ban.¹⁸ Upon signing the 1989 Ethics Reform Act, President Bush praised the statute as containing “important reforms that strengthen Federal ethical standards” and described the honoraria ban for federal employees as one of the “[k]ey reforms in the Act.”¹⁹ Far from being a chance addition to the Act, the uniform and absolute ban on honoraria was the crucial reform that allowed the remainder of the Act to pass.²⁰

¹⁷ See, e.g., *To Serve With Honor* at 34 (describing “eclectic” set of rules among executive agencies).

¹⁸ See Statement on Signing the Ethics Reform Act of 1989, 25 Weekly Comp. Pres. Doc. 1855 (Nov. 30, 1989) (the Act “is based on . . . the recommendations of the President’s Commission on Federal Ethics Law Reform, and the report of the House Bipartisan Ethics Task Force.”); 135 Cong. Rec. H8747-48 (daily ed. Nov. 16, 1989) (remarks of Rep. Lynn Martin, co-chair of House Bipartisan Task Force) (“a good part of [the bill] is based on the recommendations of the President’s ethics commission”).

¹⁹ Statement on Signing the Ethics Reform Act of 1989, *supra*, note 18.

²⁰ The political branches have continued their effort to solve the problem of honoraria. This year both houses of Congress have passed bills limiting the gifts, trips, and meals that Members of Congress can receive from lobbyists. See *Congressional Gifts Reform Act: Report of the Committee on Governmental Affairs*, S. Rep. No. 255, 103d Cong., 2d Sess. 1-3 (1994) (discussing various bills). Where the political branches believe the problem of honoraria affects only the legislature, they are fully capable of passing legislation applying only to Congress.

B. Ample Facts Support the Policy Choice by the Political Branches to Ban Honoraria.

The court of appeals founded its conclusion in significant part on a factual assumption that is demonstrably wrong: that there were no improprieties before 1989 that would have been prevented by the honoraria ban, and there were no "serious enforcement or line-drawing costs" associated with the prior regime.²¹ In fact, the reasonableness of the policy judgment to ban honoraria has been borne out since passage of the Ethics Act. A report of the General Accounting Office ("GAO Report") demonstrates that the old rules were not working.²² The report presents the results of a GAO study of federal employees' activities outside the scope of their employment, the conflicts of interest that may result from those activities, and the effectiveness of regulations designed to safeguard against improprieties.

Based on its investigation of eleven agencies, the GAO Report addresses the adequacy of agency controls over federal employees' outside activities, including controls on speaking and writing, prior to the effective date of the honoraria ban. In direct contradiction to plaintiffs' repeated assertions that existing conflict of interest regulations were adequate, the GAO Report concludes that "[s]ome agencies did not monitor employees' activities outside of the government to the extent needed to ensure that violations of related laws and regulations were

²¹ 990 F.2d at 1276. As the district court correctly found, "[a]buses of the 'honoraria' custom and practice were well-documented, as was the consequent erosion of public confidence in the integrity of government, and had been common public knowledge for many years." 788 F. Supp. at 8.

²² U.S. General Accounting Office, *Employee Conduct Standards: Some Outside Activities Present Conflict-of-Interest Issues* (released to Congress in Feb. 1992; released to public on Mar. 30, 1992) (hereinafter *GAO Report*) (reprinted as Appendix B to Common Cause's Brief in Support of Certiorari).

avoided."²³ Indeed, the report notes that "[b]ecause of overly permissive approval policies, five agencies approved some outside activities, such as speaking and consulting, that appeared to violate the standard of conduct prohibiting the use of public office for private gain. These activities preceded the . . . ban by Congress on the acceptance of honoraria (compensation) by most federal employees for outside speeches, articles, and appearances."²⁴

Moreover, the GAO Report points to the uneven enforcement of the pre-1989 conflict-of-interest regulations. "Standard-of-conduct regulations and procedures for monitoring employees' outside activities varied widely among the 11 agencies. . . . [The GAO] found little consistency in the restrictions on employees' outside activities or agency approval requirements."²⁵ The uneven enforcement of the pre-ban regulations identified in the GAO Report created a system of perceived and actual unfairness that seriously undermined the pre-existing conflict-of-interest regulations. Against this backdrop, the judgment of the political branches that a broad prophylactic ban was needed to curb the actual and potential abuse of honoraria was clearly reasonable.

²³ *GAO Report* at 1.

²⁴ *GAO Report* at 2.

²⁵ *GAO Report* at 6. In addition, the GAO Report found:

Most agencies did not periodically update their approvals of employees' outside activities that were to continue over several years even though employees' duties could change over this time to create conflicts of interest. *Id.* at 7.

Some agencies did not require that employees provide adequate information necessary for determining whether conflict-of-interest and standard-of-conduct requirements were met. *Id.* at 7.

Some agencies did not require employees to report the amount of compensation they expected to receive from outside activities. Thus, the agencies could not determine whether the employees complied with restrictions on outside compensation. *Id.* at 7.

The activities of the individual plaintiffs themselves (many of whom exercise important discretionary functions, despite their self-description as low-level employees) raise substantial questions about the effectiveness of subjective regulations. For instance, the agricultural editor for the Voice of America complains that the honoraria ban unfairly prohibited him from speaking for payment before a gathering of agricultural groups at a conference in Rome. These groups have a substantial interest in the contents of his VOA reports, but this apparently did not raise questions of conflict of interest either for him or for his agency. Similarly, the business editor at the VOA, also a plaintiff, has written articles on a free-lance basis for organizations such as American Express and the U.S. Chamber of Commerce, even though they have a decided interest in how the VOA reports business news. 990 F.2d at 1275-76. And, as the court below noted, one "can understand some anxiety about receipt of payment" by a GS-7 tax examining assistant, given "the universality of citizens' subjection to the Internal Revenue Services." *Id.* at 1276. The judgment of the political branches that subjective regulations and self-policing by those with interest in nonenforcement were inadequate is borne out on the facts of this case.

Further, substantial evidence supports the judgment that the decline in public confidence in the government warrants a broad ban on government employees' receipt of honoraria. By the late 1980's, public trust in government had dropped to levels even lower than in the aftermath of Watergate, and a large majority of the citizenry believed that all branches of government were more responsive to wealthy special interests than to the good of the country as a whole.²⁶ Indeed, an extensive academic

²⁶ See, e.g., David Broder et al., *A Grass-Roots Report: Voters Voice Increasing Disillusionment*, Wash. Post, Apr. 22, 1987, at A1; Michael Oreskes, *As Election Day Nears, Poll Finds Nation's Voters in a Gloomy Mood*, N.Y. Times, Nov. 4, 1990, at A1. Public confidence in government has continued to erode since that time. See Robert Shogan, *Public Discontent for Lawmakers Hits New*

literature supports the argument that executive branch officials may be "captured" by the interests they are supposed to regulate.²⁷ These concerns have only become more acute since 1989, and a decision by this Court to override the political branches' limitation on the receipt of honoraria would surely exacerbate public distrust of government.

II. THE COURT BELOW FAILED TO APPLY THE PICKERING BALANCING TEST GOVERNING PUBLIC EMPLOYEES' SPEECH.

The court below erred when it failed to apply the test this Court has established for evaluating regulations of speech by government employees. This Court has held that the government in its role as employer has greater power to regulate the terms and conditions of government employment for employment-related reasons than it has in other contexts. "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); see *Connick v. Myers*, 461 U.S. 138, 140 (1983); *Snepp v.*

See Robert Shogan, *Public Discontent for Lawmakers Hits New Highs*, L.A. Times, Mar. 10, 1994, at A5; Dan Balz and Richard Morin, *Perot Factor Still Percolates*, Wash. Post, May 23, 1994, at A1. The 1989 Bipartisan Task Force Report stated the purpose of the Ethics Reform Act in a single sentence: "to restore public confidence in the integrity of government officials by promoting the highest professional and ethical standards in public service." *Bipartisan Task Force Report* at 1.

²⁷ See, e.g., Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29 (1985); James V. DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 Va. L. Rev. 257 (1979); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667 (1975); George J. Stigler, *The Theory of Economic Regulation*, 2 Bell. J. Econ. & Mgt. Sci. 3 (1971); Paul J. Quirk, *Industry Influence in Federal Regulatory Agencies* (1981).

United States, 444 U.S. 507, 509 n.3 (1980). These cases require the Court "to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon issues of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. No subsequent decision of this Court has supplanted the *Pickering* balancing test. See *Waters v. Churchill*, No. 92-1450, 1994 U.S. LEXIS 4104, at *21-*22 (May 31, 1994) (citing *Pickering* as the relevant test).²⁸

The broad authority of Congress to regulate the speech of federal employees is illustrated in the cases upholding the constitutionality of the Hatch Act's limits on government employees' right to engage in political advocacy at the core of the First Amendment. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers* ("CSC"), 413 U.S. 548 (1973); *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947). In *CSC*, 413 U.S. at 564, the Court recognized that Congress faces a range of policy choices regarding permissible activities by government employees, and that it is within Congress' discretion to choose among competing alternatives. By comparison to the Hatch Act's absolute ban on core political speech, the Ethics Reform Act's mere limit on receipt of compensation is at most a minor burden on the speech of government employees.²⁹

²⁸ See also *Waters*, 1994 U.S. LEXIS 4104 at *21 ("the government as employer indeed has far broader powers than does the government as sovereign"); *id.* at *29 ("the extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible").

²⁹ The honoraria ban only regulates the financial consequences of speeches, articles or appearances, rather than the speech itself. 990 F.2d at 1273. While restrictions on financial incentives may implicate First Amendment concerns, *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501 (1991), the

Although the Court of Appeals noted *Pickering*, it did not even attempt to apply the balancing test set forth there. Rather, it engaged in an overbreadth analysis, without giving adequate consideration either to the lower burden necessary to justify a restraint on government employees' speech,³⁰ or the limited nature of the restraint at issue here (a ban on compensation, not a ban on speech). It thus erred in departing from the *Pickering* test.

The court below did recognize that "the government has a strong interest in protecting the integrity and efficiency of public service and in avoiding even the appearance of impropriety created by abuse of the practice of receiving honoraria." Indeed, the court found it could "safely assume . . . that the interest in avoiding the appearance of impropriety is strong enough to outweigh government employees' interest in engaging in speech for compensation where the compensation creates such an appearance."³¹ The court below conceded that "for some of [its] applications—perhaps many of them," the honoraria ban is constitutional under the *Pickering* balancing test.³² Under this Court's precedents, that is sufficient to sustain the facial constitutionality of the statute, and should have ended the analysis. This departure from the teachings of *Pickering* imperils the federal government's ability to act reasonably as an employer

character and effect of the restriction is relevant to the *Pickering* balancing test. Here, government employees are permitted to speak and write, and they are also entitled to reasonable travel expenses. Moreover, the restrictions in *Simon & Schuster*, 112 S. Ct. at 508, were content-based, while the honoraria ban is content-neutral, 788 F. Supp. at 7.

³⁰ See 3 F.2d at 1565 (Silberman, J., dissenting from denial of rehearing) (government interest need not be compelling, and need not even substantially outweigh burden on speech, in order to satisfy the *Pickering* balancing test) (citing *Connick*, 461 U.S. at 150).

³¹ 990 F.2d at 1274 (emphasis in original omitted).

³² *Id.*

—as distinct from its role as the state—and to regulate its workers so that they can effectively and efficiently carry out their duties.³³

III. THE HONORARIA BAN IS NOT SUBSTANTIALLY OVERBROAD.

Even if overbreadth were the proper form of analysis rather than the *Pickering* balancing test, plaintiffs have not met the difficult standard that this Court's decisions establish.³⁴ Statutes may be found facially invalid only in two limited circumstances: the plaintiff must demonstrate that the challenged law either "could never be applied in a valid manner" or that even though it may be validly applied to the plaintiff and others, it nevertheless is so broad that it "may inhibit the constitutionally protected

³³ See *Waters v. Churchill*, 1994 U.S. LEXIS 4104 at *28-29 ("The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as a sovereign to a significant one when it acts as an employer. . . . [W]here the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate").

³⁴ "[F]acial challenges to legislation are generally disfavored," *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990). In general, this Court has deemed as-applied challenges to be sufficient to protect constitutional rights. *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973). Facial challenges must be approached "with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). See also *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 977 (1984) (Rehnquist, J., dissenting) ("When a litigant challenges the constitutionality of a statute, he challenges the statute's application to him. . . . If he prevails, the Court invalidates the statute, not *in toto*, but only as applied to those activities. The law is refined by preventing improper applications on a case-by-case basis. In the meantime, the interests underlying the law can still be served by its enforcement within constitutional bounds").

speech of third parties."³⁵ Different substantive standards apply to each of these types of facial challenges.

The first standard is not implicated here, because the honoraria ban is clearly constitutional in some circumstances, as the court below conceded. 990 F.2d at 1274.³⁶ As for the second kind of facial challenge, it "will not succeed unless the statute is 'substantially' overbroad, which requires the court to find 'a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.'" ³⁷ Because plaintiffs are seeking to vindicate their own rights, not the rights of third parties, overbreadth is simply the wrong legal analysis, and facial invalidation the wrong remedy, for this case.

Even if overbreadth were the applicable doctrine, the Ethics Reform Act is not substantially overbroad.³⁸ The court below struck down the honoraria ban because the statute does not require a nexus between the employee's

³⁵ *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988) (quoting *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984)).

³⁶ "[T]he first kind of facial challenge will not succeed unless the court finds that 'every application of the statute create[s] an impermissible risk of suppression of ideas.'" *New York State Club*, 387 U.S. at 11 (quoting *Vincent*, 466 U.S. at 789 n.15).

³⁷ *New York State Club*, 487 U.S. at 11 (quoting *Vincent*, 466 U.S. at 801) (emphasis supplied). The courts are "reluctant[] to strike down a statute on its face where there [are] a substantial number of situations to which it might be validly applied." *Parker v. Levy*, 417 U.S. 733, 760 (1974); cf. *Joseph H. Munson Co.*, 467 U.S. at 964-65 (for overbreadth challenge to succeed, plaintiff must show there is no core of easily identifiable conduct the statute may permissibly regulate).

³⁸ The only case in which this Court has applied an overbreadth analysis to speech by government employees is *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). In *Broadrick*, the Court upheld a restriction far more onerous than that at issue here: a total ban on speech (compensated or uncompensated) in political campaigns.

job and the subject matter of the speech or the character of the payor. But this conclusion is a non-sequitur for several reasons. First, as discussed above, it does not address the government's interest in regulating its employees,³⁹ and relies entirely on inapplicable cases concerning government regulation of the citizenry at large. Second, it assumes that the government's sole interest is the prevention of partiality and the appearance of favoritism, when, as set forth above, the government also has an interest in ensuring that its employees serve only one master and do not shirk their official duties while pursuing profits from other work.⁴⁰

The court below did not even accurately apply this Court's cases on tailoring. "[T]he requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation' and 'the means chosen are not substantially broader than necessary.'" ⁴¹ As demonstrated above, the honoraria ban serves substantial government interests; it is more effective than the prior enforcement regime; and it prohibits conduct

³⁹ Cf. *Broadrick*, 413 U.S. at 616 (rejecting overbreadth challenge against law regulating government employees even though statute "is directed, by its terms, at political expression which if engaged in by private persons plainly would be protected by the First and Fourteenth Amendments").

⁴⁰ See, e.g., *To Serve With Honor* at 35 ("The further harm in tolerating honoraria is that such payments encourage outside speeches and travel by federal officials and employees, activities that take time and energy away from the individual's other federal duties"); *Bipartisan Task Force Report* at 40 (pursuit of honoraria "detract[s] from the time and energy [employees] can devote to public service").

⁴¹ *Ward v. Rock Against Racism*, 491 U.S. 781, 799-800 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). The *Ward* standard applies to content-neutral statutes. As the courts below found, the honoraria ban is content-neutral. 788 F. Supp. at 7; cf. *Broadrick*, 413 U.S. at 616 (restricting political speech of government employees is content-neutral regulation).

that is within the government's power to regulate.⁴² Therefore, even if overbreadth were the correct test, the honoraria ban would be constitutional.

IV. THE DECISION HOW TO REGULATE HONORARIA IS PROPERLY A POLICY JUDGMENT FOR THE POLITICAL BRANCHES.

The court below failed to give adequate deference to the judgments of the political branches of government about the proper regulation of federal workers.⁴³ The result of the judgment below is that, unlike legislative and judicial branch employees, executive branch employees can only be forbidden from taking private money for honoraria when there is a nexus between the speech at issue (or the identity of the payor) and the employee's duties. The Constitution cannot compel a less restrictive ban on executive branch employees than employees of the other branches.⁴⁴ Nor can it compel a distinction between different grade levels within the executive branch itself.

A flat ban on honoraria is certainly necessary for senior-level executive branch officials, such as the Secretaries of Commerce and the Treasury and the U.S. Trade

⁴² See *Broadrick*, 413 U.S. at 618 (rejecting overbreadth challenge in context of government employee speech, and holding that law may not "be discarded *in toto* because some persons' arguably protected conduct may or may not be caught or chilled by the statute").

⁴³ See *Waters v. Churchill*, 1994 U.S. LEXIS 4104 at *25-*26 ("we have given substantial weight to government employers' reasonable predictions of disruption, . . . even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential").

⁴⁴ The constitutionality of a flat ban on honoraria for legislative and judicial employees is not before this Court. Moreover, the nexus test advocated by the court of appeals could not practicably be applied to members of Congress and judges who are called on to decide matters that cover the full range of issues and affect all sectors of society.

Representative, whose decisions can make or lose millions of dollars for firms in virtually every sector of the economy. It is equally appropriate for numerous lower-level executive branch employees such as Federal Reserve bank examiners, assistant U.S. attorneys, SEC accountants, or OMB economists, any of whom may in a given case (not predictable in advance) exercise substantial discretionary authority over the interests of many entities and individuals. The question of which employees should be subject to a prophylactic ban on honoraria and which should be subject only to a nexus test is a quintessentially legislative decision to which the courts should defer.

The commissions that drafted the proposals ultimately adopted in the Ethics Reform Act unanimously concluded, after careful deliberation, that the government's interest in guarding against the appearance of impropriety as well as actual impropriety warranted a uniform ban. This judgment reflected the shared belief that (1) no artificial distinction between grades or branches provided an adequate cleavage between those who wielded discretionary authority and those who did not; (2) regulations implementing nexus tests (as advocated by the court of appeals) were subject to subjective and inadequate enforcement and to intentional circumvention by federal employees;⁴⁵ and (3) the significant public concern with the fair and evenhanded operation of government warranted a prophylactic rule to guard against future conflict.⁴⁶

⁴⁵ See *To Serve With Honor* at 36.

⁴⁶ The President's Commission conceded that it was "aware of no special problems associated with the receipt of honoraria within the judiciary," but concluded that the interest "in applying equitable limitations across the government" justified including the courts in the ban. *To Serve With Honor* at 35. The decision below disrupts the goal of uniform and consistent treatment of the three branches which the Ethics Reform Act was specifically designed to achieve.

In light of these findings, the political branches concluded that a subjective case-by-case review of honoraria payments would not protect the public interest as well as a comprehensive prohibition on honoraria. Prior to the honoraria ban, the receipt of honoraria was governed by vague, subjective judgments at the agency level and, to a substantial extent, on self-policing by government employees with a financial stake in non-enforcement. The political branches could have rejected the conclusions of the commissions and instead adopted a more limited statute—but they did not. Their judgment as to the need for strong preventative medicine is entitled to significant deference. See *FEC v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982) ("Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.").⁴⁷

This Court has repeatedly upheld far-reaching statutory restrictions designed to promote the integrity and efficiency of the public service. *United Public Workers of America v. Mitchell*, 330 U.S. 75, 101 & n.37 (1947); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers ("CSC")*, 413 U.S. 548, 566 n.12 (1973). Numerous courts have upheld state and local government regulations against "moonlighting" by government employees. See, e.g., *Gosney v. Sonora Indep. Sch. Dist.*, 603 F.2d 522, 527-8 (5th Cir. 1979) (uniform prohibition on outside employment); *Hayes v. Civil Serv. Comm'n*, 108 N.E.2d 505 (Ill. App. Ct. 1952) (ban on all outside employment by government employees). Unless all these decisions are wrong, lesser restrictions such as the prohibition against honoraria cannot rise to the

⁴⁷ As this Court held in the related context of campaign finance regulation: "we cannot require Congress to establish that it has chosen the highest reasonable threshold. The line is necessarily a judgmental decision best left in the context of this complex legislation to congressional discretion." *Buckley v. Valeo*, 424 U.S. 1, 83 (1976).

constitutional level that plaintiffs in this case have claimed.⁴⁸

V. THE REMEDY OF ENJOINING ENFORCEMENT OF THE HONORARIA BAN AGAINST ALL EXECUTIVE BRANCH EMPLOYEES WAS INAPPROPRIATE.

If there is anything that is truly overbroad in this case, it is the remedy chosen by the courts below.⁴⁹ The plaintiffs here are all lower-level career employees, grades GS-15 or below. 927 F.2d at 1253. These plaintiffs do not have standing to challenge the honoraria ban as applied to senior-level career employees or political appointees. No one can reasonably dispute that a broad prophylactic ban on honoraria is necessary for the commissioners of the FTC, NLRB, or SEC, for members of the President's Cabinet, or for many (if not all) other senior executive branch employees.⁵⁰ The courts below erred when they

⁴⁸ On motion for rehearing, two judges discussed the provision in the honoraria ban applying a "nexus" test to a series of speeches. 3 F.3d at 1556-58, 1562-63. As Judge Williams noted, there are valid reasons for a distinction between a single speech and a series of speeches, most particularly because the area of greatest abuse was single speeches. "[I]n addressing complex problems a legislature 'may taken one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" *Bowen v. Owens*, 476 U.S. 349, 347 (1986) (quoting *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955)). This exception demonstrates that the statute is in fact narrowly tailored to address the areas of greatest abuse, and therefore is not substantially overbroad.

⁴⁹ As this Court has held, in fashioning a remedy a court should "refrain from invalidating more of the statute than is necessary." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984)).

⁵⁰ Indeed, although the court of appeals held that no broad prophylactic ban on honoraria could be imposed on executive branch employees, it then, inexplicably, expressed approval for an Executive Order that applies exactly such a ban to senior executive branch officials. 990 F.2d at 1279. If the statute were really unconstitutional as applied to the entire executive branch, then the Executive Order would be too.

invalidated the statute as to a class of people who were not properly before them, and as to whom the statute is in fact constitutional.⁵¹

Moreover, a broad prophylactic ban against receipt of honoraria is appropriate for at least some lower-level executive branch employees. As discussed above, the court of appeals agreed that "for some of [the honoraria ban's] applications—perhaps many of them—the *Pickering* balance supports its constitutionality."⁵² Given this concession, the court should have constructed a remedy distinguishing employees who exercise sufficient discretion to justify a prophylactic ban from those who do not, and should have, at most, held the statute invalid only as against the latter. Even were this Court to determine that the political branches may not ban the receipt of honoraria by all executive branch employees, the appropriate remedy would be to enjoin enforcement of the ban against only those lower-level employees for whom a nexus test will reliably prevent any risk of favoritism or the appearance of impropriety. Of course, the difficulty in drawing this line is what led the political branches to adopt a uniform prohibition in the first place—but this just underscores why the courts should defer to the political branches in matters of line-drawing and policy.

⁵¹ As this Court has observed, standing "is an essential and unchanging part of the case-or-controversy requirement of Article III," *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992), and is "fundamental to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those 'Cases' and 'Controversies' that are the business of the courts rather than of the political branches." *Id.* at 2145. For a court to impose a remedy broader than that the plaintiffs had standing to seek disrupts the constitutional balance as much as for a court to entertain a suit that the plaintiffs did not have standing to bring.

⁵² 990 F.2d at 1274. The court later observed that honoraria payments to a Voice of America business analyst would "raise an eyebrow" and stated that it could "understand some anxiety" about such payments to a GS-7 tax examining assistant at the IRS. *Id.* at 1275-76.

CONCLUSION

It may well be that as a policy matter this Court would prefer a less uniform law, one that distinguished among the different branches of government, the different levels of government employees, and the different types of activity for which honoraria are paid. But the political branches had the right to conclude, as they did, that such distinctions would have left room for evasions that would create the reality or appearance of partiality in government service. The Constitution does not forbid a consistent, blanket ban against government workers' obtaining payment from private parties for giving speeches and writing articles.

For the reasons set forth above, the Court should reverse the judgment below.

Respectfully submitted,

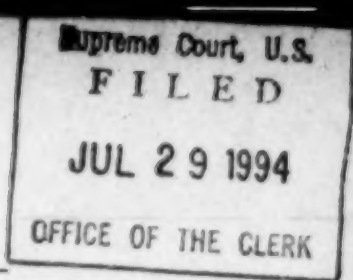
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No. 93-1170



IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF *AMICUS CURIAE* OF PUBLIC CITIZEN, INC.
IN SUPPORT OF RESPONDENT

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ON WRIT OF CERTIORARI
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 FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE OF PUBLIC CITIZEN, INC.
 IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

This brief is filed, with the written consent of the parties, on behalf of Public Citizen, Inc., a nonprofit membership organization of approximately 125,000 members. Although a number of its members are career federal civil servants, this brief is submitted by Public Citizen not on behalf of the interests of those members, but on behalf of Public Citizen's members generally who have an overriding interest in a strong and effective federal civil service. Public Citizen firmly believes that the government

is generally a positive force for good in our society, but that, in order for government to be effective, there must be not only strong and imaginative leaders, but dedicated, hard-working, able civil servants to carry out the policies set by those in charge. This in turn requires a workforce that has high morale and a dedication to the job. Those traits can be maintained only if federal employees believe that they are being treated fairly and play important roles in their organization.

The briefs of petitioners and its *amicus* Common Cause place considerable emphasis on the importance of the public perception that there is an honest federal civil service. We agree. But we also recognize that excessive attention to perceptions sometimes produces overly stringent rules, and that those rules, as applied to career civil servants, as well as political appointees, are not without cost. In some instances, they may be bad for morale, and, especially in combination with other and similar restrictions, they may ultimately destroy the quality of the federal work force by causing able people to leave and discouraging the next generation of would-be civil servants from applying for those jobs. Furthermore, if government employees are treated as though they cannot be trusted, that treatment may be translated into conduct since people often conform their behavior to the expectations set for them. Moreover, those who are subjected to stringent rules should be able to understand the rationales for them. It is difficult enough to secure compliance with restrictive but sensible rules; but when those rules don't make sense, compliance will be less likely, given grudgingly, and at a cost of undermining morale. This brief is being filed to demonstrate how senseless the rules at issue in this case are and to emphasize the costs that such rules impose on the workings of our government.

SUMMARY OF ARGUMENT

At issue in this case is a rule that prohibits career federal civil servants from receiving any compensation whatsoever for making certain categories of oral public statements and certain categories of writings. Although not a content-based restriction in the sense that the ban is directed at the subject matter of the speech or the viewpoints expressed, the effect of this "honorarium ban" is to reduce the amount of speech in our society, which makes it subject to scrutiny under the First Amendment.

In Point I of this brief, we demonstrate that the ban simply does not make sense. None of the traditional justifications offered for these kinds of restrictions on speech have anything to do with the ban at issue here. Moreover, two major exceptions -- one allowing officials to accept free travel, meals and lodging for "one relative" and the other allowing the official to direct that the sponsor make a charitable contribution of up to \$2000 in recognition of the official -- undermine even the supposed bases for this ban. For these reasons, this ban cannot be sustained on any basis, let alone under the high level scrutiny to which it is subjected under the First Amendment.

In Point II, we review the literature and current thinking on the effect of excessive rules on federal employees. As this review makes clear, stamping out all perceptions of possible improprieties may be a good idea in the abstract, and it may be the right decision in some cases, but it is never without cost. Employee morale may suffer, valuable civil servants may leave the government, and others who are considering joining the federal civil service may never apply or decline appointments if offered. While perhaps not as well-recognized as the problem created when potential appointees for high-level executive appointments turn them down because of concerns about rules regarding financial disclosures, conflicts of interests, and post-employment restrictions, the burdens of the honorarium ban

on career employees, and hence on the overall effectiveness of our government, cannot be gainsaid. Accordingly, when weighing the governmental interest in the honorarium ban, that interest must be reduced by the burden that the regulation imposes on federal civil servants and ultimately the government programs and people whom they are employed to serve.

ARGUMENT

THE JUDGMENT BELOW SHOULD BE AFFIRMED.

The honorarium ban at issue here is challenged only as it applies to career federal civil servants. The ban applies to both certain types of oral statements and certain writings. In neither case is it a ban on the activity, but solely on the receipt of money for it. The government argues that this limited ban imposes only a minimal restriction since it does not directly forbid speech. Even if it were impossible to pinpoint particular individuals who have refrained from speaking or writing because of the honorarium ban -- and the record cited by respondents makes clear that there are specific individuals who have stopped writing because they can no longer be paid -- there can be no doubt that the effect of the ban is to reduce the overall quantity of speech from federal employees, a result that petitioners admit requires the rule to be judged under one of the standards applicable to the First Amendment, and not simply as a question of social or economic policy for which a rational basis would suffice. In our view, the Court should apply the level of scrutiny used in *Turner Broadcasting System, Inc. v. Federal Comm. Comm'n*, ___ U.S. ___, 62. U.S.L.W. 4647, 4658 (1994), which is that set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Under it, a regulation can be sustained only if it "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental

restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Under this or any other standard applied in First Amendment cases, the challenged ban cannot be sustained.

I. THERE IS NO JUSTIFICATION FOR THIS HONORARIUM BAN.

A. *The Operation of the Ban.*

Although the ban applies to both speeches and writings, most of the discussion in the briefs of petitioners and their *amicus* focus on oral presentations, in large part because most of the record before Congress related to speeches, principally by Members of Congress or senior staff members, and not writings for general publications by anyone, let alone career federal civil servants. The obvious concern of Congress and the public regarding senior legislative branch personnel was that they would simply show up, stand up, make a brief statement, and get paid. Moreover, in most cases the audiences had direct interests in the subject of the speech, which was often a matter then pending before a committee of Congress to which the Member belonged or on which the staffer had a senior position.

Nonetheless, despite the quite limited nature of the record on which the ban was based, as explained more fully in the brief of respondents, the honorarium ban applies to all career civil servants, no matter on what topic they speak or write, how little or how much money they are paid, or who is making the payment. Furthermore, while single lectures are forbidden, a series of lectures is permitted, whether as part of a formal education course at an accredited university or not. And while no subject is off limits, the ban forbids the receipt of even a dollar by all federal officials, from

Members of Congress to GS-1 clerks and maintenance personnel.¹

Although most of the legislative debate focussed on honoraria for a public appearance, the prohibition on payment for writings is the principal concern of many of the plaintiffs here. Because the ban is so broad, it applies to writing an op-ed piece in the *Washington Post*, a book review in the *New York Times*, or an essay in a specialty magazine on birds, South American Indians, or the history of the French resistance in World War II. Again, as with speeches, anyone can write, but they cannot be paid. Again, the ban applies without the necessity of any connection between the subject matter of the written work and the employment activity of the career civil servant. And, while federal civil servants cannot be paid for articles, they can be paid for writing books, or even chapters of books, even if those chapters had their origins in an article, or later became an article.

Moreover, "works of fiction, poetry, lyrics, or script" are all exempt from the prohibitions on compensation for writings, 5 C.F.R. § 2636.203(d) (Pet. App. 125a), and it appears that the exemption extends to oral presentations of such materials as well, since there is an exception in the definition of speech in 5 C.F.R. § 2636.203(c) for "recitation of scripted materials" (Pet. App. 124a). It thus appears that a Member of Congress could recite one of his poems at a meeting of a trade association that has business directly pending before the Member's committee and receive a fee of \$1000, yet a career civil servant could not accept

¹Although petitioners make much of the need to have the same ban apply to all covered personnel, we note that distinctions based on career vs. non-career personnel, on pay grades, and on branch of government are made in the related restrictions in the same act, 5 U.S.C. App. 7 § 502, which impose limits on other outside employment.

\$100 for a technical lecture involving a subject having nothing to do with that individual's full-time job. That same regulation also excludes the "conduct of worship services or religious ceremonies," without regard to whether the person performing them is a licensed member of the clergy, and the definition of "appearance" in subsection (b) also excludes "performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display." 5 C.F.R. § 2636.203 (b). Whatever the merits of such exemptions in the abstract, or whether the religious exception raises Establishment Clause issues, it is not difficult to see how they could be used as escape-hatches, especially by those whose presence, not their message, is the reason the sponsor decided to pay them.

B. *Possible Justifications for the Ban.*

In considering the constitutionality of the honorarium ban for career civil servants, even petitioners recognize that the First Amendment requires *some* public purpose for imposing it. Respondents' brief will focus on the appropriate test to be applied under the First Amendment. But in our view, any test, other than the highly deferential rational basis test applicable to economic regulations, which even petitioners do not seek, cannot sustain the honorarium ban at issue here.

Petitioners and their *amicus* attempt to cover up the weakness of the justifications for this ban by invoking broad generalizations, such as avoiding the appearance of impropriety and assuring the integrity of the federal workforce.² But, as was made clear in a recent report of a

² Petitioners describe the interest to be protected by the ban on honoraria in phrases such as payments that "can involve actual corruption; more importantly, [they] can readily convey an (continued...)"

special American Bar Association Committee on Government Standards (on which undersigned counsel served), those phrases are simply not helpful ways to analyze the issues raised by a wide variety of ethical questions. See *Keeping Faith: Government Ethics and Government Ethics Regulation*, 45 Admin. L. Rev. 287, 294-296 (1993) ("Keeping Faith"). Rather, the proper way to consider the restriction is to focus on the specific rationales offered to justify it and then determine whether the restriction holds up under them. Accordingly, we now examine the possible justifications for

²(...continued)

appearance to the public that influential access to government officials can be purchased by outside interest groups" (Pet. Br. 19); they involve the "potential for impropriety" (20) or the "very appearances of impropriety that Section 501(b) sought to overcome" (23); the "interest in strengthening citizen confidence in the integrity of the federal workforce" (24 n. 21); payments "pose a threat to the public's perception of the integrity of the federal workforce," and the government has an "interest in reducing suspicion about the cause or effect of a particular honorarium," and the "possibility of impropriety" (25); "public confidence in government may be eroded because of actual or perceived impropriety in the receipt of honoraria" (28); and the ban "protect[s] the appearance of integrity of the federal workforce" (35).

Common Cause's brief contains similar expressions of the rationale for the rule: to "prevent real and apparent abuses of government office" and "[p]ublic distrust of government" (Am. Br. 3); to "ensure the appearance as well as the reality of impartiality in the federal government" (5); "polls and public surveys showed rising public cynicism over the practice of honoraria, and . . . the inherent potential for conflicts of interest" (7); ban will "promote public confidence in the integrity of government" and avoid "appearance of impropriety" (8); honoraria "undermined public confidence in fair government and created an appearance of impropriety, if not actual impropriety itself" (10).

the ban on the payment of money for speeches and articles and show that the ban cannot stand up under any level of scrutiny.

1. *The Content of the Speech.* We begin by restating what petitioners proclaim is not at issue here: the ban is not content based since it does not seek to suppress speech on particular subjects, and the government is not attempting to prevent any employee from speaking out on any issue, even if it might have some connection to an interest of the federal government. What petitioners fail to recognize, however, is that by eschewing reliance on the interest in suppressing speech because of its content, they jettison the principal cases that have upheld the suppression of speech by government employees: *Pickering v. Board of Education*, 391 U.S. 563 (1968), *Connick v. Myers*, 461 U.S. 138 (1983), and *Waters v. Churchill*, 114 S.Ct. 1878 (1994). In each of those cases, the only basis for sustaining the government's position was that it had a legitimate interest in preventing the governmental employee from making certain statements, whether for pay or not. In each of those cases, the issue of pay was irrelevant, yet payment is what makes otherwise acceptable speech impermissible here. Stated another way, none of the employees in those cases would have been better (or worse) off if they had been paid for their speech. Accordingly, none of those authorities, nor for that matter the authorities involving the Hatch Act, such as *Broadrick v. Oklahoma*, 431 U.S. 601 (1973), or *CSC v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973), assist petitioners because the rationale for each was that the government had the right to prevent speech because of its content, the very rationale which the government insists does not apply here.

2. *Misuse of Official Information.* A second rationale sometimes offered, often in conjunction with the first, is that it is not the message or the ideas contained in the speech that must be suppressed, but the misuse of government information, generally, but not always, for profit. The unauthorized use by Frank Snepp of CIA documents to write

and sell his book is the most well-known example in this Court of the ability of the government to suppress that kind of activity, *Snepp v. United States*, 444 U.S. 507 (1980), but similar although less direct uses of inside information to write an article, represent a client, or speak to a trade association on a topic of current interest within the employee's purview are within this rationale. See 18 U.S.C. § 1905 (forbidding dissemination of trade secrets and other confidential business information). The principle there is that the employee is improperly trading, for personal profit, on information gained by the employee on her job and that if she is discussing the issue at all, it ought to be only as part of the agency's information dissemination or outreach program and the speech subject to the agency's normal clearance processes. That rationale is also irrelevant to this honorarium ban because it is undisputed that none of these plaintiffs sought to write or speak on any topic remotely related to their federal employment.

3. *Profiting Based on One's Official Position.* A third justification involves situations in which the federal employee is paid for whom she is, not for what she has to say, and therefore she is profiting based on her position or title, which is similar to, although different from, the second category where the content of what is said is important. Of course, the two categories can, and often do converge, but that is not inevitable, since some audiences will pay to hear an important person, regardless of what she has to say. Since all of these plaintiffs are career civil servants, no one seriously contends that any payments made to them for speeches they give or articles they write is based on their titles or importance in the government hierarchy, rather than

the substance of what they have to say.³ Accordingly, this rationale, too, falls by the wayside.⁴

4. *Prohibited Source of Payment.* Fourth, and this often overlaps with the third and to a lesser degree the second rationale, the source of the payment is suspicious because that person has an interest in a matter over which the recipient of the honorarium has influence in his or her official capacity. The fear, often justified, is that the prohibited source will use the honorarium to affect a government decision, much like a bribe, although more subtle since there is no explicit *quid pro quo*. Because there is no indication that anyone who is making the payment for any of the speeches or articles written by these federal career

³ See *Modifying the Honoraria Prohibition for Federal Employees: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 69 (1991) ("*Honoraria Hearings*") (testimony of Stephen D. Potts, Director, Office of Government Ethics) ("...there is not a lot to worry about on appearances of conflicts of interest if you are talking about lifting the honoraria ban for mid- and lower-level employees . . . [W]here the problem really crops up is with the higher ranking officials in the Government").

⁴ Because the ban applies regardless of the amount to be paid, the Court is not faced with a statute which allows payments, but limits the amount that can be received, either on a per article/per speech basis, or on a cumulative basis from one source or from all sources. Those types of restrictions were in effect prior to enactment of the honorarium ban (Pet. Br. 2-3) and would be far easier to defend than the current statute, assuming that the permitted levels of payment were in the ranges allowed in those statutes.

civil servants has any business before those individuals, this rationale cannot apply.⁵

5. *Time away from Work.* Finally, it has been argued that the prohibition on accepting honoraria will help assure that federal employees do not become so involved in the pursuit of money that they neglect their federal jobs. We doubt that such a rationale could be sustained for most federal employees because of the range of far less restrictive alternatives available to ensure that the government receives a full day's work for a full day's pay. That kind of rationale might be available for the President and other very high ranking officials who are on call 24 hours a day; for them, it might be argued, being paid for an article or speech, as opposed to doing it for nothing, might be a sufficient inducement to cause them to take time away from official duties that might require their attention.

But the Court need not decide whether that rationale could defend a narrower ban for a limited group of government officials because here the very rule challenged contains exceptions that do more than call into question this

⁵ There can be no real problem in crafting a ban that is appropriately tailored to the evils sought to be eliminated. Thus, in the exception to the ban for a series of speeches or articles, Congress excluded instances where "the subject matter [of the writing or speech] is directly related to the individual's official duties or the payment is made because of the individual's status with the Government" 5 U.S.C. App 7 § 505(3). Similarly, the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 542, 106 Stat. 2413-14, carves out an exception to the ban in section 501(b), but carefully tailors it to assure that the exception does not apply where there are valid reasons to impose the ban. To be sure, there are different ways to draft a ban on "related" speech or "prohibited" sources, and it is necessary to decide who should be subject to such rules, but no one suggests that the problem is in describing the lines to be drawn, rather than picking the appropriate dividers.

rationale as applied to this ban. Indeed, applying the "time away from the job" rationale would result in a ban for currently permitted activities and a permit for currently banned ones. Thus, if time and attention to duty were the issues, it would be wholly irrational to allow an employee to write a full-length book for pay, but to forbid her from writing a much shorter essay for pay, yet that is precisely the effect of the current honorarium ban. Similarly, if over-commitment of time was the legitimate issue, no one would forbid a single lecture for pay, but allow a series or even a full semester's course with appropriate compensation. Yet, once again, that is precisely what the current rule provides.⁶

C. *Major Exceptions Undermine Any Possible Basis for the Ban.*

The honorarium ban is difficult enough to justify on its own terms, but there are two express exceptions in the law that make it impossible to defend under the First Amendment. As this Court recently observed, "[e]xemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination; they may diminish the credibility of the government's rationale for restricting speech in the first place." *City of LaDue v. Gilleo*, 114 S.Ct. 2038, 2044 (1994).

⁶ In addition, the honoraria ban does not specifically address the ability of federal employees to earn outside income from other activities, *i.e.* "moonlighting" in second jobs that do not conflict with their official duties and responsibilities. "[A] federal employee still can work as a horticulturist and be paid for growing roses in his or her spare time [but] cannot receive a fee for giving a talk to a garden club on growing roses." S. Rep. No. 29, 102d Cong., 1st Sess. 5 (1991). Surely, if the "time away from the job" rationale was a justification for the ban, these potentially more time-consuming activities also would have been prohibited.

The first of these suspect provisions, which is an express exception to the definition of honorarium in 5 U.S.C. App. 7, § 505(3), calls into question the legitimacy of the claim that the ban operates equally for all federal officials in practice as well as on the face of the statute. Thus, the prohibition on accepting honoraria in section 501(b) is absolute, but when Congress defined honoraria, it excluded travel reimbursements, which includes lodging and meals (section 505(3)), so long as the government official does not receive pay for the speech for which the travel is undertaken. Although potentially subject to abuse when the trip is to a particularly appealing location, we do not contend that an exception allowing reimbursement for reasonable travel expenses itself destroys the constitutionality of the honorarium ban.

The problem is created because section 505(3) expands that exception to permit the traveler to bring along "one relative" whose transportation, meals, and lodging can be paid entirely by the host. This provision, which was undoubtedly intended to allow the sponsor of an event to pay for the speaker's spouse, but also would include a parent, uncle, or minor child, raises two major difficulties. Although the exception is theoretically available to any activity subject to the ban, it has no relevance to what respondents are principally seeking to do: write articles for compensation. On the other hand, it has great significance for those who wish to give speeches in far away and exotic locations, and to take along their spouse. But for the vast majority of career civil servants, no one ever invites them to such places, let alone offers to pay for the travel, meals, and lodging of "one relative." The exception thus calls to mind the famous saying of Anatole France in *Crainquebille*: "The law, in its majestic equality, forbids all men to sleep under bridges, to beg in the streets, and to steal bread--the rich as well as the poor," cited in Evans, *Dictionary of Quotations* 363 (1993). Just as "the mere assertion of a content-neutral purpose [will not] be enough to save a law which on its face

discriminates based on content," *Turner Broadcasting, supra*, 62 U.S.L.W. at 4652, so the assertion that the honorarium ban applies equally to all federal officers and employees is not enough to save it when it operates very differently among those who are supposed to be affected equally.

Perhaps even more significant is the fact that the exception creates precisely the kinds of appearances of impropriety that the ban is supposed to eliminate. It is bad enough that a member of Congress or a senior congressional staffer is invited to a posh resort to give a speech (without pay), where the hospitality is likely to be more memorable than the talk that is delivered. But allowing the invitee to bring along a spouse at no cost is nothing less than a gaping loophole in the entire rationale for creating the ban in the first place. Since the "relative" performs no services in exchange for the travel, the generosity of the sponsor can only be the result of a desire to curry favor with the invitee because of his or her position. Indeed, unless otherwise prohibited (which may be the case for executive, but not legislative branch personnel, see 5 C.F.R. § 2636.204(b), Pet. App. 128a), the sponsor of the travel can have important business before the invitee, and hence paying for the invitee's relative can have precisely the same effect as the not-so-subtle bribes that the honorarium ban is supposed to eliminate. And even if one were to accept the rather far-fetched rationale that the ban on being paid for speaking and writing is designed to discourage people from devoting too much time to outside activities, allowing a federal official to bring along a relative on a speaking junket is likely to increase the desire of the invitee to spend an extra day away from work and to do something other than get caught up on office reading in his spare time away from home.

Finally, although the amount of money received is not relevant under the ban, the record indicates that those civil servants who publish articles are compensated at levels in the several hundred dollar range, whereas airplane fares (even coach), meals, and lodging for several days are likely to be

many times that amount, thereby compounding the conflicts problems raised above. Thus, like the proverbial thirteenth stroke of the clock, the exception for travel by a relative calls into question all that comes before it.

There is a second exception contained in section 501(c) that makes it clear both that the rationales offered for the ban are not sufficient to sustain it, and that a far less onerous law can be written to get at any legitimate concerns that may exist. This provision excludes from the ban payments of up to \$2000 to charitable organizations made in lieu of honoraria, so long as the neither the federal official nor certain close relatives derive any financial benefit from the payment. Although receiving \$2000 in cash is better than having someone donate that amount to the charity of their choosing, the latter is still a significant favor that will be remembered by the federal official, the charity, and its supporters, particularly if the official is a Member of Congress who is running for reelection. Moreover, unlike certain of the other exceptions, this one is not lost when "the subject matter [of the speech] is directly related to the individual's official duties or the payment is made because of the individual's status with the Government," as applies for a series of speeches, articles, or appearances under section 505(3). Furthermore, setting a \$2000 maximum is a much more carefully tailored response to situations in which the possible appearance of impropriety is the only justification than is the absolute ban in section 501(b). Although somewhat less egregious than the travel exception, the charity exception also undermines the purported evenhandedness and rationale for the broad ban on receipt of honoraria at issue here. As the ABA Committee on Government Standards noted, the "blunderbuss effect" of such restrictions "creates pressure to carve out exceptions, which in turn further compromise the ethical coherence of the regulation." *Keeping Faith* at 320.

* * * * *

Those are the rationales offered by petitioners and their *amicus*, and each is woefully lacking in substance. Indeed, it is even doubtful that they would pass the rational basis test, let alone the far more stringent First Amendment standards that apply here. It is not simply that these rationales are unconvincing or fail to meet a heightened First Amendment level of scrutiny; rather they are, when carefully analyzed and applied to the specifics of what is prohibited and what is not (including the exceptions for paid travel for a relative and payments to charities), silly to the point of insulting to those who are forced to abide by them. As we now show, the harm done is not limited to the repression of speech, but also effects the quality of work done by the government.

II. THE HONORARIUM BAN IS COUNTER-PRODUCTIVE BECAUSE IT NEEDLESSLY HARMS THE MORALE AND EFFECTIVENESS OF CAREER FEDERAL EMPLOYEES.

The honorarium ban set forth in section 501(b) contravenes one of the most important and necessary objectives of ethics reform: "[W]e cannot afford to have unreasonably restrictive requirements that discourage able citizens from entering public service." *To Serve With Honor: Report of the President's Commission on Federal Ethics Law Reform* 2 (Mar. 1989). See also The White House, "Remarks by the President to the Ethics Commission During Signing of An Executive Order" (Jan. 25, 1989). "The goal of any legislation in this area is to achieve the appropriate balance between maintaining the public's trust in the ethical conduct of its Government and permitting federal employees the freedom and opportunity to pursue professional and personal growth." S. Rep. No. 29, 102d Cong., 1st Sess. 3 (1991).

The honorarium ban prevents federal employees from receiving compensation for activities which in no way relate to the nature of their employment or the character of the payor. In doing so, it damages the morale and productivity of those career civil service workers currently employed by the federal government and is likely to discourage able and dedicated people from entering public service. "An 'ethics' rule that treats a file clerk's income from writing an article on pet care like a Senator's income from speaking to an interest group affected by pending legislation cannot credibly claim to embody a value system worthy of employees' respect." *Keeping Faith* at 320.

Although it is difficult to ascertain the reasons why employees leave federal service, and almost impossible to assess why some choose not to enter at all,⁷ experts on the career civil service have repeatedly emphasized that the ban will reduce the quality of the federal work force by creating yet another disincentive to join or remain in public service. "By constricting the sphere of 'private' life, these rules foster a perception of the government as a heavy-handed and meddlesome employer." *Id.* at 320. The ban effectively denies federal employees their outlets for stress, as well as their avenues for personal development, whether as a historian or a writer or a garden club lecturer. As a result, the government will become even more unattractive to employees already disenchanted with public service⁸.

⁷ See *Effects of Federal Ethics Restrictions on Recruitment and Retention of Employees: Hearing Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service*, 101st Cong., 1st Sess. 61-63 (1989) (statement of Frank Q. Nebeker, Director, Office of Government Ethics) ("*Recruitment and Retention Hearings*").

⁸ See *Honoraria Hearings* at 18 (testimony of Rep. Constance A. Morella) ("Essentially, we are sending a message to the public: (continued...)")

"[E]thics-in-government laws are part of a bargain; if they are unduly restrictive, no bargain will be struck, and the government will lose the services of persons it wants and needs." Arthur S. Neely, IV, *Ethics-in-Government Laws: Are They Too "Ethical"?* 55 (1984) ("*Too Ethical*").⁹

The honorarium ban harms the career civil service because it violates an essential principle of human nature: rules that appear fair and reasonable invite compliance, while rules that categorically forbid behavior invite disobedience and engender ill-will.¹⁰ Among the justifications for the ban advanced by petitioners and their *amicus* is that broad prophylactic restrictions are necessary because narrower rules are easier to evade. In reality, overly stringent rules can have costs that were never intended or even considered by those seeking to address the problem: "The danger that must be recognized and avoided is the assumption that there can

⁹(...continued)

If you are creative on your own time, don't join the Federal Government. If you are creative and a Federal employee, leave").

⁹ See also *Honoraria Hearings* at 141 (statement of Carol A. Bonosaro, President, Senior Executives Association)(quoting one SEA member who if forced to "abandon his hobbies, which provide outside income...will 'probably continue with the government, albeit with considerable pain and bitterness'").

¹⁰*Keeping Faith* at 295 ("no ethical system will be internalized by its members unless they are persuaded that it represents what is *right* as well as what is *the law*")(emphasis in original); see also *Recruitment and Retention Hearings* at 63 (testimony of Frank Q. Nebeker cautioning against restrictions which "are clearly drafted to cover conduct that is beyond [the] legitimate interests of the government," and favoring prohibitions only when "a governmental process would be harmed...or there would be a reasonable and clear loss of credibility on the part of the public in the governmental processes if [the employee] engaged in the conduct").

never be a harmful surplus of ethics in government." *Too Ethical* at 54. Despite petitioners' self-serving claim that the ban has a minimal impact on employees, its inevitable effect will be to drive capable employees from government service. "The bite of this kind of prior restraint is mild, of course, and in a sense optional; any man who objects may avoid it by not serving in government office. But that is not enough of an answer. We want men to serve the government." Bayless Manning, *The Purity Potlatch: An Essay on Conflicts of Interest, American Government, and Moral Escalation*, 24 Fed. Bar J. 239, 254 (1964) ("Manning"). As the ABA Committee on Government Standards concluded, a "genuine commitment to improving ethics in government...requires resisting the simple, and popular, assumption that more regulation is better regulation." *Keeping Faith* at 340.

Furthermore, by extending the honorarium ban to all private activities, the government sends a message of distrust to its employees. A rule which presupposes the existence of corruption when there is no reasonable likelihood that it actually exists not only demeans and demoralizes employees, but is counterproductive as well. First, it loses sight of the potential inherent in treating employees as persons of honor and integrity. Most federal employees, especially career civil servants, entered government because of their commitment to public service, despite the "many well-known and broadly accepted burdens" which it entails. *Fairness for Our Public Servants: The Report of the 1989 Commission on Executive, Legislative and Judicial Salaries* 1 (Dec. 1988). The honorarium ban ignores the psychological reality that servants of an effective government must feel invested with confidence in their integrity. "The best way to make a man trustworthy is to trust him. And the best way to attract men of dignity to public service is to treat them as men of dignity." *Manning* at 254.

In addition, such stringent regulation may in turn produce the kind of ethical abuses that the regulations hope to eradicate: "If we insist upon treating government

employees as if neither their motives nor their judgement can be trusted, those who do not leave in frustration and disgust will end up by being no better than they are posited to be." *Keeping Faith* at 294. Already demoralized by stagnant pay scales and increasing public animosity towards government service, many career civil servants will perceive the ban as another unfair burden they are expected to bear. And when treated with suspicion and forced to adhere to draconian rules, it is understandable that even the most dedicated public servant will be increasingly less willing to shoulder those burdens.

For all these reasons, there can be no doubt that the honorarium ban has had and will continue to have significant adverse impacts on federal employment that must be taken into account in an assessment of the validity of the ban. The problems created by being "too ethical" undermine the governmental interests that the ban purports to serve. Coupled with the absence of any legitimate justification for the ban, and the very significant exceptions that undercut the rationales that are claimed to support it, the court of appeals was plainly correct in holding that the ban violates the First Amendment.

CONCLUSION

The judgment of the court of appeals striking down the
honorarium ban should be affirmed.

Respectfully submitted,

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v.

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
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BRIEF OF AMICUS CURIAE
PETER BOLLEN
IN SUPPORT OF RESPONDENTS

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**BRIEF OF AMICUS CURIAE
PETER BOLLEN
IN SUPPORT OF RESPONDENTS**

INTEREST OF AMICUS

This brief is filed on behalf of Peter Bollen, a veteran Post Office employee whose plight illustrates the unmitigated unfairness of the Ethics Reform Act of 1989 ("Reform Act"). As stated in the affidavits attached to this brief, Mr. Bollen has worked as a clerk for the United States Postal Service in Lynnfield, Massachusetts for over twenty years. While off duty, he has written and sold a number of non-fiction works. Mr. Bollen has received several thousand dollars for writing two books and a few hundred dollars for some articles. For the past four years, however, he has stopped writing such articles for fear of the \$10,000 fine and possible

discipline he would suffer for receiving compensation, no matter how small, for such writing.

Because of the impact of the Reform Act, Mr. Bollen had to abandon plans to publish a review of a Frederick Douglass biography. In early 1991, Mr. Bollen decided to write and sell a review of the book during the Black History Month of 1991. Of course, since the demand for the review has obviously greatly diminished because of the passage of time, he has abandoned his plans to critique that book.

Mr. Bollen has also delayed writing an article on a 104-year-old journalist. The journalist has covered every major war of the 20th Century and has written over twenty books. In order to do a responsible job, Mr. Bollen would have to incur costs; he would have to travel to Vermont to interview the journalist and purchase several of his out-of-print books. Because of his limited resources, Mr. Bollen has delayed writing this article despite the obvious risk of delaying an interview with a centenarian.

In December 1990, Mr. Bollen brought an action in the District of Massachusetts claiming that the Reform Act violated his First Amendment rights. Bollen v. United States, C.A. No. 90-13049. The District Court dismissed the claim without prejudice on June 5, 1992 because of the D.C. Circuit action. Mr. Bollen appealed this dismissal to the First Circuit. Bollen v. United States, C.A. No. 92-1965. On September 10, 1992, the court stayed Mr. Bollen's appeal pending the resolution of this action. Mr. Bollen is not a member of the National Treasury Employees Union.

Pursuant to Supreme Court Rule 37.3, Mr. Bollen's counsel, New England Legal Foundation has obtained written consent for the filing of this amicus brief from counsel for the Petitioner and Respondent. Copies of the consents are being filed with this brief.

STATEMENT OF THE CASE

Amicus accepts and adopts the Respondent National Treasury Employees Union's Statement of the Case.

SUMMARY OF ARGUMENT

Amicus Curiae's brief makes three points. First, the Reform Act is unconstitutional as a content-based restriction because it prohibits receipt of compensation for non-fiction articles while permitting such payments for most other writings including fiction. Second, the Government has failed to meet its burden of proving that its interest outweighs those of affected federal employees. There is no significant government interest in prohibiting receipt of compensation for non-fiction articles written by lower level executive branch employees which outweighs the severe burden the Act places on those employees' First Amendment rights. Third, to the extent that the Reform Act furthers legitimate government interests in prohibiting federal employees from receiving such compensation, those interests are already adequately protected by existing laws.

ARGUMENT

I. PROHIBITING RECEIPT OF COMPENSATION FOR WRITING VIOLATES THE FIRST AMENDMENT FREEDOM OF EXPRESSION.

The Ethics Reform Act of 1989 prohibits practically all federal employees from receiving compensation for certain writings and speeches. 5 U.S.C. app. § 501(b) (1992). "Honorarium" is defined as a "payment of money or any thing of value for an appearance, speech or article" 5 U.S.C. app. § 505(3) (1992). Regulations adopted by the Office of Government Ethics, however, exclude numerous types of appearances, speeches and articles from the definition of these terms. 5 C.F.R. § 2636.203(b), (c) & (d) (1992). An "article" means "a writing, other than a book or a chapter of a book, which has been or is intended to be published or republished in a journal, newspaper, magazine or similar collection of writings." 5 C.F.R. § 2636.203(d) (1992). "The term does not include works of fiction, poetry, lyrics, or script." *Id.* Individuals who violate the ban on honoraria are subject to fines of up to \$10,000 and disciplinary or corrective action, including termination. 5 U.S.C. app. § 504(a) (1992); 5 C.F.R. § 2636.104(a)

& (b) (1992).

Plainly the honorarium ban in the Reform Act is a content-based restriction on speech. For that reason, and because it fails the test announced in Pickering v. Board of Education, 391 U.S. 563 (1968), it violates the First Amendment.

A. *The Ethics Reform Act Is An Unconstitutional Content-Based Regulation.*

Much like the law that was struck down in Arkansas Writers Project, Inc. v. Ragland, 481 U.S. 221 (1987), the Reform Act is content-based. In Arkansas Writers Project, the statute imposed a tax on sales of personal property including general interest magazines. Id. at 224. Such magazines could contain articles on a variety of subjects, such as, sports or religion. Id. The law, however, exempted religious, professional, trade and sports journals. Id.

The ban on honoraria applies to an extremely narrow group of writings: non-fiction articles. "Non-fiction" is of course short-hand for articles concerning such topics as sports, news, entertainment or politics. On the other hand, the Act permits receipt of compensation for a broad range of writings, including plays, poetry and fiction.¹ Thus, the Reform Act, like the Arkansas statute, draws distinctions based on content and, no matter how well intentioned, creates absurd results. Mr. Bollen, for example, could have written and been paid for writing a play concerning Frederick Douglass, but he could not legally be paid for writing a review of

¹Although Amicus does not suggest that this Court has or should create a hierarchy of First Amendment protection based on the content of speech, if there were such a hierarchy, non-fiction and political commentary would surely be at its apex. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW at 786-87 (2d ed. 1988) (discussion of Professor Meiklejohn's theory). Such speech deserves the greatest First Amendment protection, exactly the opposite of the result under the Reform Act.

such a play.²

Content-based regulations are presumptively unconstitutional. As this Court held, "[a]bove all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject, or, its content." Arkansas Writers Project, 481 U.S. at 230 (citation omitted). More precisely, "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board, 112 S.Ct. 501, 508 (1991). Accord Arkansas Writers' Project, 481 U.S. at 230. The image of a government censor categorizing the content of Peter Bollen's writing in order to determine whether to impose a \$10,000 fine is a direct affront to the First Amendment.

B. *Under The Pickering Test, The Reform Act Is Unconstitutional.*

As the court below held, because this case "involves a government burden on the speech of its own employees, Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), supplies the standard for judicial review of the congressional action." National Treasury Employees Union v. United States, 990 F.2d 1271, 1272 (D.C. Cir. 1993). Under Pickering, the court must balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern" against "the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. Cases subsequent to Pickering have used various terms to describe the Government's burden of proof. See, e.g., Waters v. Churchill, 62 U.S.L.W. 4397, 4401 (1994) ("the government may have to make a substantial showing that the

²Not only does the sweep of the ban lack logic, it also lacks clarity. For example, would a satiric poem discussing current events be licit poetry or illicit political commentary?

speech is, in fact, likely to be disruptive before it may be punished"); Rutan v. Republican Party of Illinois, 497 U.S. 62, 69-70 & n. 4 (1990) (plurality opinion) (the regulation must be the "least restrictive means" to further the Government interest); Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989) ("the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation'"). However, whatever form of words is used, the Reform Act is unconstitutional. See National Treasury Employees Union, 990 F.2d at 1275 (finding that the Reform Act is unconstitutional under "even the most lenient" burden of proof).

1. *The Government's Interest In Prohibiting Compensation For Writing By Lower Level Executive Branch Employees Is Minimal.*

Of course, the Government has an interest in "protecting the integrity and efficiency of public service and in avoiding even the appearance of impropriety" National Treasury Employees Union, 990 F.2d at 1274. As the Court of Appeals held, this interest is strong enough to outweigh employees' First Amendment rights only in cases where the compensation for writing actually creates an appearance of impropriety. Id. As Mr. Bollen's case shows, there is no appearance of impropriety in the vast majority of situations to which the Reform Act applies. The Government has failed to identify any conceivable nexus between a lower level executive branch employee's job and "either the subject matter of the expression or the character of the payor." Id. at 1275. There has been no suggestion that newspapers, which would pay Mr. Bollen for a book review, have a relationship with the Post Office "that would make them wish to curry its favor." Id.

Such a nexus, however, might exist between honorarium payors and Senators, federal judges, senior executive branch employees and Congressmen and Congresswomen. The legislative history shows that that nexus was the concern of both Houses. See

National Treasury Employees Union, 990 F.2d at 1278 ("the floor debates indicate that Congress was principally concerned that the receipt of honoraria by members of Congress created the appearance of influence-buying"). See also 135 Cong. Rec. H8732-03, H8766 (daily ed. Nov. 16, 1989) (statement of Representative Wolpe) ("a pay adjustment provision tied directly to the elimination of all honoraria or speaking fees"); 137 Cong. Rec. S10254-01, S10267 (daily ed. July 17, 1991) (statement of Senator Stevens) ("It is to me just a matter of simple justice that we now eliminate honoraria and equalize [House of Representatives and Senate] salaries."). In fact, the Senate Majority leader mistakenly thought that the Reform Act did not even apply to lower level executive branch employees. See 135 Cong. Rec. S15966-02, S15987 (daily ed. Nov. 17, 1989) (statement of Senator Mitchell) (the bill was a "complete ban on honoraria not only for [Members] but for the Federal judiciary and for senior executives in the executive branch of government.") (emphasis added). The legislative rationale for the Reform Act supports an honoraria ban on Senators, Members of the House of Representative, senior executive branch employees and federal judges. However, it clearly does not support an honoraria ban on lower level executive branch employees.

The impetus for the Reform Act certainly was not a fear of "abuses" by lower level executive branch employees such as Mr. Bollen. No reasonable person could argue with a straight face that a Lynnfield, Massachusetts postal clerk's receipt of a few hundred dollars for writing a review of a biography of an abolitionist creates even the slightest appearance of impropriety and/or diminishes the efficiency of the United States Postal Service. Nor could any reasonable person explain why publishing Mr. Bollen's article creates an appearance of impropriety, while putting the same prose in a book does not create one.

2. *The Burden Placed On The Employee's Right Of Free Expression Is Severe.*

The burden placed on Mr. Bollen's First Amendment right of

free expression is clearly severe. The large fine and potential disciplinary action integral to the Reform Act chills Mr. Bollen's right to speak. He has stopped writing non-fiction articles because of the Act.

In order to sidestep this severe burden, the Government resorts to redrafting the Constitution. The Government contends that "[t]he ban does not prevent or punish speech of any kind; rather it bans only the receipt of payment for employee speech." U.S. Brief at 12. This definitional legerdemain is without basis. The United States argues in effect that the phrase "free expression" means expression without compensation, as opposed to expression without governmental interference.

Under the Government's unique reading of the First Amendment, expression is protected only if it is given away. Accordingly, it appears that the United States would argue that a law that bans sales of newspapers would be constitutional. Of course, few newspaper publishers would give their newspapers away for free and so such a law would effectively cripple the Fourth Estate.

The Government's attempt to bifurcate speech into paid and unpaid types not only creates absurd results, it also runs contrary to clear precedent. This Court has repeatedly held that "paid speech" merits as much First Amendment protection as does "unpaid speech." "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." Riley v. National Federation of the Blind, 487 U.S. 781, 801 (1988). See also New York Times v. Sullivan, 376 U.S. 254, 266 (1964) (for First Amendment purposes, it is "immaterial . . . that newspapers and books are sold" rather than being given away for free); L. TRIBE, AMERICAN CONSTITUTIONAL LAW at 892 (2d ed. 1988) (efforts to confine First Amendment protection to "pure expression" has and must fail "because the purveyor of ideas and information is likely to want both to convince others and to earn money . . ."). It would be contrary to our entire democratic system to redraft the First Amendment to provide protection to only those who are so

rich that they do not care about being paid for their writing.

In Simon & Schuster, the Court struck down New York's "Son of Sam" law which required that the income criminals derived from describing their crimes be placed in escrow for the benefit of their victims. 112 S.Ct. at 508. Such a "financial burden operate[s] as [a] disincentive[] to speak" and therefore violates the First Amendment.³ 112 S.Ct. at 504. If the United States prevails in this action, the result would be that literary murderers would have greater First Amendment protection than postal clerks.⁴

C. *The "Harm" Sought To Be Eradicated By The Ethics Reform Act Is Adequately Controlled By Existing Law.*

Ironically, the Reform Act, which imposes a severe restriction on the First Amendment rights of millions of honest, career government workers is unlikely to have any net positive benefits at all. The "harm" that the Government seeks to eradicate with respect to lower level executive branch employees is already

³While the Government concedes that "removing a financial incentive to engage in expression does trigger First Amendment concern," it offers absolutely no support for the contention that "the character of the restriction in Section 501(b) [of the Reform Act] is far less onerous than a ban on expression, and the restriction consequently has less weight in the Pickering balance." U.S. Brief at 15.

⁴Another way to view the impact of an absolute ban on receiving compensation for writing articles is to analogize it to a 100% tax on such income. Since the honorarium ban only affects certain types of writing, it is as noted above, content-based. In Arkansas Writers Project, the Court held that a tax on certain magazines based on their content is a "discriminatory tax on the press" and that it "burdens rights protected by the First Amendment." 481 U.S. at 227. A fortiori, the 100%, content-based "tax" of the Reform Act, burdens First Amendment rights.

adequately controlled by existing law. Putting aside the absurdity that a lower level executive branch employee such as a postal clerk would have either the power or the desire to exchange political favors for paid publication of non-fiction articles, such acts are crimes punishable by up to five years imprisonment and a \$50,000 fine. 18 U.S.C. §§ 203, 216 (1993). More specifically, the Office of Personnel Management has prohibited certain activities that are "incompatible" with government service. 5 C.F.R. § 735.203(a) Note (1993). Such activities include "[a]cceptance of a fee, compensation, gift, payment of expense, or any other thing of monetary value in circumstances in which acceptance may result in, or create the appearance of, conflicts of interest" 5 C.F.R. § 735.203 (a)(1) Note (1993).

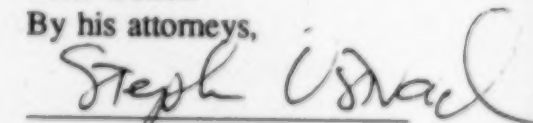
Thus, the only "benefit" that might result from the Reform Act is preventing the appearance of impropriety resulting from acts which do not create an appearance of a conflict of interest, such as Peter Bollen's book review of the Frederick Douglass biography. The government's interest in infringing on actions like Mr. Bollen's is neither "compelling," "substantial," or even serious, and such an interest warrants no protection at all.

CONCLUSION

For the reasons stated above, Amicus Peter Bollen respectfully requests this Court to affirm the decision of the Court of Appeals for the District of Columbia Circuit.

DATED: Boston, Massachusetts: July 27, 1994.

Respectfully submitted,
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By his attorneys,



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No. 93-1170

**In The
Supreme Court of the United States
October Term, 1994**

UNITED STATES OF AMERICA, ET AL.,
Petitioners,

v.

NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**APPENDIX OF AMICUS CURIAE
PETER BOLLEN**

The following affidavits were filed in the United States District Court for the District of Massachusetts in the case of Bollen v. United States, C.A. No. 90-13049.

AFFIDAVIT OF PETER BOLLEN

Peter Bollen, plaintiff in this action, states the following under the pains and penalties of perjury.

1. I have been employed as a clerk by the United States Postal Service since 1974. My current wage is \$15.27 per hour. That is less than the amount specified for Grade 16 of the General Schedule.

2. During the past seven years I have written two books, "A Handbook of Great Labor Quotations" and "Nuclear Voices". I have received approximately \$3500 to \$4000 from the sales of those books.

3. During the past several years I have written articles which were printed in newspapers and magazines including North Shore Sunday and Sports Autographs. I have received approximately \$225 to \$300 for writing those articles.

4. At no time while employed as a federal employee have I ever been reprimanded or disciplined for my writing nor have I ever violated or been accused of violating the federal regulation banning compensation for speaking or writing on any subject that might present even an appearance of a conflict with my duties as a public employee.

5. A publisher has contacted me and indicated a willingness to pay me for the right to publish a new edition of my book, A Handbook of Great Labor Quotations. That publisher has offered to publish a revised and enlarged version of that book to which I

would add additional quotations and textual material or to publish instead simply an updated version containing new quotations. If the former is chosen, I would receive more than if only quotations were added.

6. I desire to continue writing articles for publication in newspapers and magazines. Based upon my experience in this field and my acquaintance with editors and publishers, I believe that, except for the application of the Act to me, I could write and sell at least four to eight articles during the remainder of 1991. Based on my experience in this field I believe that, except for the impact of the Ethics Reform Act, I would receive at least approximately \$300 to \$1000 from the sale of those articles in 1991.

7. I am currently writing a review of "Frederick Douglass" a recently published biography written by William McFeely. I expect to have finished that review by February 15, 1991. I believe it is very likely that I could sell that review to a newspaper or magazine published in this area because of Mr. Douglass' strong local connection to Lynn (he lived in Lynn for many years before the Civil War), because I have corresponded with Mr. McFeely which will add depth to my review and finally because I have already had other reviews published in the past. I anticipate submitting this review to, among others, the Lynn Sunday Post, which has previously published accounts of my work. The market value and timeliness of a review of Mr. McFeely's book are relatively high now, but based on my personal experience, I believe that value will drop precipitously as time passes for the following reasons. First, other reviews will be written and published. Second, the book will gradually cease to be "news." Finally, February is Black History Month when there is an increased market for writing about famous black Americans. Accordingly, the market value of the review will diminish irreparably with time. The longer the time that passes before I can sell that review the less I will be able to obtain for it and the possibility it will become unsalable will increase.

8. Furthermore, I wish to write an article about George Seldes, a 100 year old journalist who has covered every major war of the 20th Century and who has written over 20 books including "Witness to a Century." I believe that, in view of the current interest in media coverage of the war in the Persian Gulf, such an article would definitely be salable. However, based on my personal experience as a writer, I believe that to do a responsible job of writing such an article, I would have to travel to Vermont to interview Mr. Seldes, purchase several of his books, which are out of print, and incur substantial other research, travel and copying costs and expenses. In light of my limited personal resources these expenses would be significant to me and so I cannot and will not incur such expenses at this time unless I have at least the possibility of recouping them by selling this article. Thus, so long as the ban on "honoraria" remains in effect I am absolutely precluded from writing this article.

9. I have entered into a contract to write monthly articles for the Northeast News Service for \$50 per month plus expenses beginning in December of 1990. Unless I am assured that performance of that contract is legally permitted I may have to breach the contract since I cannot afford to suffer a \$10,000 civil fine.

10. I expect to be appointed acting editor of the Northeast News Service shortly. As acting editor, I would receive a salary for my duties which would include writing articles, editing articles written by others and performing other managerial duties. Unless assured I can legally assume that position I may have to refuse it.

11. On February 6, 1991, while at my duty station in Lynnfield, I received a copy of the attached January 30, 1991, letter relating to the Ethics Reform Act's ban on receipt of honoraria by federal employees.

Sworn to under the pains and penalties of perjury.

Dated: 2/12/91

/s/
Peter Bollen

SUPPLEMENTAL AFFIDAVIT OF PETER BOLLEN

Peter Bollen, plaintiff in this action, states the following under the pains and penalties of perjury.

1. Since the Ethics Reform Act of 1989 took effect on January 1, 1991, I have reduced the amount of time I have spent researching, writing and editing articles on non-fiction topics. So long as the ban on receipt of honoraria for articles remains in effect I will necessarily have to continue to restrict my writing.

2. Because my income from the Postal Service has always been relatively modest, I have always tried to use my spare time to earn a small supplementary income. My personal preference has been and continues to be to try to earn that income by writing non-fiction books and articles for sale. Writing non-fiction articles has enabled me to express my opinions and beliefs on a variety of topics which I believe are of public importance and interest and about which I believe I have something unique to say.

3. However, so long as I cannot receive income from selling non-fiction articles, I will have to turn a portion of my efforts to other, more profitable activities. I may try to write fiction or other "governmental-approved" forms of writing or I will try to earn money from other "government-approved" occupations that do not involve speaking or writing on non-fictional matters. Consequently, for so long as the ban on honoraria remains in effect, there will be non-fiction articles that I will not write solely because of the financial impact of the ban on me.

Sworn to under the pains and penalties of perjury.

Dated: 3/29/91

/s/ _____
Peter Bollen

(10)
No.93-1170

Supreme Court, U.S.

FILED

JUL 29 1994

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

United States of America, *et al.*,

Petitioners,

v.

National Treasury Employees Union, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**BRIEF OF AMICUS CURIAE THE SENIOR EXECUTIVES
ASSOCIATION IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICUS CURIAE

The Senior Executives Association (SEA) is a private, nonprofit, voluntary, dues-supported organization representing career members of the federal Senior Executive Service (SES), and those in equivalent pay systems.¹ Its membership includes current and former members of the Senior Executive Service, as well as Senior Level and Senior Technical employees. SEA concerns itself with issues affecting the career executive service as a whole, and works to: improve the efficiency, effectiveness, and productivity of the federal government; advance the professionalism of career executives; advocate the interests of over 7000 career federal executives; and enhance public recognition of career federal executives.

Though the Senior Executives Association does not represent individual executives in federal personnel matters arising within the individual agencies, the Association is concerned about matters which might affect the integrity of the career executive corps. The Association has been recognized as the authentic voice of the federal career executive corps, and its views concerning the Senior Executive Service have often been solicited by congressional committees, the media, executive agencies, and officials of the executive branch. In its representational capacity, SEA participated in the notice and comment period for the Office of Government Ethics' (OGE) proposed Standards of Ethical Conduct for Employees of the Executive Branch, which were later promulgated as regulations implementing the Ethics in Government Act of 1978, as amended, 5 U.S.C. app. § 501 *et seq.* (Supp. V 1993).

SEA represents only career, non-political appointees to the Senior Executive Service. The qualification authority for career appointees in the Senior Executive Service, like that for career executive branch employees at the GS-15 level and below, is the

¹ All parties to this case have consented to the filing of this brief. Copies of the written consents of the parties are on file with the Clerk of the Court.

Office of Personnel Management. 5 U.S.C. §§ 3132(a)(4), 3392(a) (1988 & Supp. V 1993). Though there are non-career, political appointees that occupy SES positions, the qualification authority for those positions lies with the appointing agency, rather than the Office of Personnel Management. 5 U.S.C. § 3132(a)(4) (1988). Career executive branch employees and senior executives, unlike noncareer appointees, have a property interest in their employment affording them the right to due process in personnel actions. See 5 U.S.C. §§ 7541(1), 7543 (1988). Thus career members of the SES, unlike non-career appointees, are subject to many of the same rights and limitations as members of the plaintiff class of career GS-15 level and below executive branch employees.

While career members of the Senior Executive Service were not represented among the Plaintiff class in Respondent's judicial efforts to overturn the honorarium ban provisions of the Ethics in Government Act of 1978, as amended, 5 U.S.C. app. § 501(b), the Senior Executives Association, on behalf of its membership and federal career executives, supports those efforts. The United States Court of Appeals for the District of Columbia Circuit overturned section 501(b) as applied to all executive branch employees. *NTEU v. United States*, 990 F.2d 1271, 1279 (D.C. Cir. 1993). It found that the honorarium ban placed an unconstitutional burden on certain First Amendment conduct of career federal employees without demonstrating a nexus between the speech and the performance of job duties. *Id.* at 1277. Career senior executives therefore will be adversely affected to the same extent as Respondents if the honorarium ban provisions are reinstated as to executive branch employees.

Thus SEA asserts essentially the same interest as both Respondents the National Treasury Employees Union (NTEU), and the certified Plaintiff class of career executive branch employees at the GS-15 level and below. Namely, SEA seeks to ensure that important First Amendment rights of career execu-

tive branch employees, including career executives, are not indiscriminately limited by congressional action, while seeking to promote the efficiency, effectiveness, and productivity of the federal government.

BACKGROUND

Title VI of the Ethics Reform Act of 1989, amending the Ethics in Government Act of 1978, prohibits receipt of compensation for speeches, appearances or articles by any Member, officer, or employee of the federal government. 5 U.S.C. app. §§ 501(b), 505(3) (Supp. V 1993). This ban on "honorarium" was enacted as a Congressional response to a number of highly publicized ethics scandals involving its own members. *E.g.*, 135 Cong. Rec. H8747 (daily ed. Nov. 16, 1989) (statement of Rep. Martin). While the ban does not create an express ban on speech by United States government employees, it tends to limit the exercise of free speech by the targeted legislative, judicial, and career executive branch employees.

Respondent NTEU, and one of its local chapters, joined with the American Federation of Government Employees, a number of individual plaintiffs, and a certified class representing persons employed by the Executive Branch at the GS-15 grade level and below. This class filed suit in the United States District Court for the District of Columbia to enjoin enforcement of the "honorarium ban." The district court found the honorarium ban unconstitutional as applied to all executive branch employees, and severed the provision as it applied to these employees. *NTEU v. United States*, 788 F. Supp. 4, 11 (D.D.C. 1992), *aff'd*, 990 F.2d 1271 (D.C. Cir. 1993). The United States Court of Appeals for the District of Columbia Circuit affirmed the lower court's decision severing "officer or employee" from section 501(b) except in so far as those terms encompass members of Congress, officers and employees of Congress, judicial officers and judicial employees. *NTEU v. United States*, 990 F.2d 1271, 1279 (D.C. Cir. 1993). The decision below ensured protection

of certain First Amendment conduct of not only Respondent and members of the Plaintiff class, but of all executive branch employees, including career members of the Senior Executive Service.

SUMMARY OF ARGUMENT

The court of appeals properly found the honorarium ban unconstitutional for its overbreadth as applied to all executive branch employees. The court of appeals found, by applying the *Pickering* balancing test, that the governmental interest in efficiency and preventing the appearance of impropriety did not outweigh the interest of career executive branch employees in exercising free speech rights where a substantial portion of the speech activities have no nexus to functions performed by the employing agency.

Career executive branch employees at every grade and pay level are already subject to a comprehensive scheme of regulatory and executive guidelines setting forth stringent limits on off-duty conduct. Given these less-restrictive alternatives already in place in the executive branch personnel system, Congress should have drawn the honorarium ban more narrowly to advance its interests. Congress never expressed specific concerns about the appearance of impropriety, or a reduction in governmental efficiency, stemming from the receipt of honorarium by career executive branch employees or Senior Executives for engaging in speech activities lacking any nexus to the performance of governmental functions. In addition, Congress' motives for discriminating among different forms of employee speech are suspect, and demand greater justification. Because the honorarium ban does not promote a legitimate, substantial interest of the government as applied to a substantial portion of the off-duty free speech conduct of career federal employees, it cannot be upheld under the *Pickering* First Amendment analysis.

The court of appeals properly severed the unconstitutional honorarium ban provision as applied to career executive branch employees, including career federal executives, from the remainder of the Ethics Reform Act of 1989. That court found that the remaining provisions will adequately fulfill the purposes of Congress in enacting the ban. In addition, the court below properly struck the offending provision because there is no viable alternative construction of the ban which would serve the interests of Congress.

ARGUMENT

I. THE HONORARIUM BAN PROVISIONS AS APPLIED TO CAREER EXECUTIVE BRANCH EMPLOYEES PLACE AN UNCONSTITUTIONAL BURDEN ON THE EXERCISE OF FIRST AMENDMENT RIGHTS BY THESE EMPLOYEES.

A. The Court of Appeals Decision Properly Applied the *Pickering* Standard of Review.

The United States Court of Appeals for the District of Columbia Circuit found that the balancing test formulated in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), supplies the standard of review for the congressional action in question. It chose the *Pickering* balancing analysis because the legislative provision at issue here involves a governmental restriction on the exercise of free speech by its employees.² In its Brief,

² Petitioner relies on the Court's *Pickering* analyses in *Connick v. Myers*, 461 U.S. 138 (1983), and *Waters v. Churchill*, 114 S. Ct. 1878 (1994), in suggesting that the government is owed great deference where it seeks to regulate the speech of its employees. (Brief at 13-14). However, as set forth more fully in Section I.B. below, the employee speech at issue in *Connick* and *Waters* was speech by employees concerning work-related matters, or having an adverse effect on the workplace. Therefore, the off-duty employee speech targeted by the honorarium ban, which could have no nexus to governmental functions, is fundamentally different from the speech at issue in those cases. Thus, SEA contends that *Connick* and *Waters* are not analogous to this case, and the results in those cases are not applicable here.

Petitioner argues that Congress has the authority to compel career employees to relinquish First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest, and to be justly compensated for their expressive efforts. (Brief at 13-14). It justifies this position by contending that the honorarium ban promotes administrative efficiency and avoids the appearance of impropriety by government employees. (Brief at 14, 17-18). However, this Court has long held that the government may not so severely burden its employees without substantial justification. *Pickering*, 391 U.S. at 568 (citing, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Wieman v. Updegraff*, 344 U.S. 183 (1952)).

To this end, this Court has developed a balancing test to weigh the respective interests of the government employee in exercising free speech rights against the government's interest in maintaining an effective workforce. In *Shelton v. Tucker*, 364 U.S. 479 (1960), the Court recognized a state's "legitimate and substantial interest" in investigating the competence and fitness of its teachers. *Id.* at 485. The Court acknowledged that a teacher's off-duty conduct was a permissible basis for determining his fitness, and that a state has a vital concern in making this inquiry, based upon its countervailing interest in the efficient administration of public education. *Id.* Yet the Court's decision in *Shelton* ultimately turned on the Arkansas legislature's unlimited inquiry into the associational background of its employees. *Id.* at 490. In overturning the Arkansas statute, the Court expressed concern that the inquiry could be conducted without regard to the bearing of a particular associational relationship upon the teacher's occupational competence or fitness. *Id.* at 488. Ultimately, the Court found the weight of Arkansas' articulated interest insufficient to uphold the law where the interest could be more narrowly achieved. *Id.* at 490.

Honing this interest-balancing inquiry, the Court in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), held that the government may not unreasonably restrict its employees' exercise of First Amendment freedoms. *Id.* at 568. In that case, the Court struck a balance between the interests of the public employee as a citizen in commenting upon matters of public concern, and the interest of the government as employer in promoting the efficiency of the public services it performs through its employees. *Pickering*, 391 U.S. at 568, 574.

The *Pickering* interest-balancing test has since been firmly established as the appropriate inquiry in cases concerning the government's assertion of an interest in limiting First Amendment activities of its own employees. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987); *Connick v. Myers*, 461 U.S. 138, 142 (1983). The Court has consistently required the government to articulate a substantial and important governmental interest supporting a broad First Amendment intrusion. E.g., *U.S. v. O'Brien*, 391 U.S. 367, 382 (1968) (requiring substantial state interest in continued availability of draft cards to outweigh incidental limitation on free speech); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 465 (1958) (state interest in regulating intrastate business insufficient to justify intrusion on associational rights); *Bates v. Little Rock*, 361 U.S. 516, 527 (1960) (municipal interest in taxing occupational licenses insufficient to outweigh citizen interest in free association).

In this case, the honorarium ban is a prophylactic law, intended to counter public perceptions that members of Congress engage in influence-peddling or create the appearance of impropriety when they make appearances, give speeches, or write articles, and are compensated for these activities. E.g., 135 Cong. Rec. H8747-48 (daily ed. November 16, 1989) (statement of Rep. Martin). The ban's prohibition on compensation for expressive activity is all-encompassing, without regard for the intent, content, or effect of the activity. The ban does not

attempt to distinguish between speech activities that disrupt or interfere with the efficient operation of the government and those activities which do not have that effect. 5 U.S.C. app. § 505(3) (Supp. V 1993). Nor does the honorarium ban make a distinction between the targeted speech and the performance of job-related duties by the employee. *Id.* Based on the broad First Amendment impact of the ban's provisions, the government must assert a substantial and important interest to justify this legislative prohibition.

It is well-established that a government acting as employer has an interest in regulating the speech of its employees that differs significantly from its interests in regulating the speech of the general public. *Pickering*, 391 U.S. at 568. However, while *Pickering* and its progeny recognize this principle, they accommodate the government's interest by weighing it against the employee's constitutional right to engage in First Amendment activities. In those cases, the Court balanced the interests in favor of protecting the employee's First Amendment rights when the exercise of those rights was unrelated to the performance of governmental functions. *Rankin*, 483 U.S. at 388-89; *Pickering*, 391 U.S. at 574; *Shelton*, 364 U.S. at 490.

Because the honorarium ban has a broad indiscriminate impact upon the exercise of free speech by its employees not necessarily relating to the efficiency of government, the court of appeals properly applied the *Pickering* balance, requiring the government to assert an important and substantial legitimate interest to justify the honorarium ban.

B. The Balance of Interests in *Connick*, *Waters*, and Similar Decisions are Not Analogous to This Case Because the Honorarium Ban Affects Employee Speech That is Unrelated to, and Has No Impact upon, Governmental Functions.

Petitioner, relying principally upon the Court's application of the *Pickering* balancing in *Waters v. Churchill*, 114 S. Ct.

1878 (1994), and *Connick v. Myers*, 461 U.S. 138 (1983), suggests that the balance of interests in this case should reflect a recognition of the government's broad powers to restrict the speech of its employees. (Brief at 13-14). SEA contends, however, that the Court's balance of the parties' relative interests in those cases is not analogous to this dispute.

Neither *Waters v. Churchill*, nor *Connick v. Myers*, concerned employee speech unrelated to the employer's business, as does the legislation at issue here. For instance, the Court's decision in *Connick* turned on the fact that the employee speech at issue arose from and concerned an employment dispute between the employee and her employer. 461 U.S. at 153. Likewise, *Waters* concerned the discharge of a government employee because of alleged statements to a co-worker that were "reasonably believed" by her governmental employer to be "disruptive" to the workplace. 114 S. Ct. at 1882-83. On those facts, *Waters* merely enunciated the common-sense principle that a government employer has the discretion to discipline or even terminate an employee for speech the employer "reasonably believes" has an impact on, or relates to employment. *Id.* at 1886, 1889-90. However, unlike *Waters* and *Connick*, the honorarium ban impinges on all off-duty speech by a government employee, regardless whether the speech affects the performance of a governmental function. Congress, in enacting the ban, never articulated a "reasonable belief" that the targeted off-duty employee speech was disruptive or impinged upon governmental efficiency.

Petitioner asserts, in arguing that Respondents' interests in engaging in free speech activities should receive less weight under the *Pickering* balance, that it is irrelevant to this case whether speech under the honorarium ban touches upon matters of public concern. (Brief at 15-16 n.17). It is precisely because the honorarium ban's prohibition on compensation for expressive activity is not narrowly focused (but rather is (a) unlimited,

and (b) applies without regard to any relationship of the expressive activity to the employee's job) that the government must articulate a legitimate, substantial and important interest in support of its action. See *Shelton*, 364 U.S. at 490. The ban has a chilling effect on the exercise of vital First Amendment freedoms by all career federal government employees, and this effect must be weighed into this Court's *Pickering* balance.

Petitioner asserts in its Brief that Congress may regulate even important constitutional rights of government employees where the exercise is deemed by Congress to interfere with governmental efficiency. (Brief at 14) (citing *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 101 (1947)). The government apparently attempts to justify the honorarium ban's discriminatory treatment of employee speech by claiming that the speech adversely affects administrative efficiency and public confidence in the government. (Brief at 18-19). This argument must also fail.

The Court in *United Pub. Workers*, a pre-*Pickering* case, examined the First Amendment impact of the Hatch Act. 330 U.S. at 96. In particular, by employing a *Pickering*-type analysis, the Court weighed the interests of federal workers in taking an active part in partisan political activities, which was already prohibited under Civil Service Rules, against the government's interest in maintaining the competence and integrity of the federal service. *Id.* The Court upheld the Hatch Act, finding that Congress reasonably determined that such political activity menaced the integrity and competency of the service. 330 U.S. at 103. However, the off-duty First Amendment conduct by career executive branch employees targeted by the honorarium ban was never deemed by Congress to interfere with governmental efficiency, as was the political activity that prompted enactment of the Hatch Act. Compare 135 Cong. Rec. H9256 (daily ed. November 21, 1989) (extension of remarks of Rep. Fazio), with *United States Civil Serv. Comm'n. v. National Ass'n*

of *Letter Carriers*, 413 U.S. 548, 555-556 (1973); and S. Rep. No. 103-57, 103d Cong., 1st Sess. 2-12 (1993), reprinted in 1993 U.S.C.C.A.N. 1802, 1802-13. Thus, the Court's balance of interests in *United Pub. Workers* is also not analogous here.

Finally, Petitioner argues that the honorarium ban is valid due to its "mild" First Amendment impact compared, for example, to the impact of more restrictive, but valid, regulations such as the Hatch Act upon federal employee political freedoms. (Brief at 27). However, Petitioner's analogy to the Hatch Act does not carry weight under the *Pickering* balance. The record developed in the district court below demonstrates that speech affected by the honorarium ban's prohibition on the receipt of compensation is not limited solely to matters of personal concern or workplace grievances. *NTEU v. United States*, 788 F. Supp. 4, 6 & n.1. (D.D.C. 1992). Further, the impact of the honorarium ban is not limited solely to situations where an employee is speaking as an employee. *Id.* While the Hatch Act expressed Congress' specific concern about the impact of employee participation in partisan political activities on the federal workforce, the effect of the honorarium ban's prohibition on employees speaking as members of the public is not so narrowly confined.

Therefore, SEA contends that the honorarium ban does not simply implement the government employer's "shopkeeper" right to regulate disruptive or improper personal activity in the federal workplace, as was the case in *Connick*. 461 U.S. at 151-52. Rather, the ban indiscriminately sanctions federal employees for off-duty expressive activities involving any subject matter, including subjects wholly unrelated to the performance of job duties or agency business. Therefore, the Court's conclusions in weighing the parties' respective interests in *Connick* or *Waters* are inapposite to this case. Based on the foregoing, this Court should simply apply the *Pickering* balance to the facts of

this case, requiring a substantial and legitimate governmental interest to support the honorarium ban.

C. The Honorarium Ban is Unconstitutional Because the Interests of Career Employees in Exercising Free Speech Outweigh the Interest of the Government in Promoting Governmental Efficiency and Integrity.

As set forth more fully below, the honorarium ban's financial disincentives on speech inflict a substantial burden on the exercise of vital First Amendment rights by career executive branch employees. These employees, for purposes of engaging in speech activities affected by the ban, are situated as ordinary citizens speaking on topics that have no bearing on the federal service. In addition, career employees are already subject to substantial regulatory limitations upon their off-duty activities. Therefore, Congress' interest in promoting efficiency and integrity in the federal government does not adequately support the broad First Amendment impact of the honorarium ban.

1. The Honorarium Ban Places a Substantial Burden on Vital First Amendment Rights of Government Employees.

Petitioner asserts that the honorarium ban does not prohibit any speech by government employees, but rather, it merely limits receipt of compensation for speech by career executive branch employees. (Brief at 15). A statute, however, is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech. *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991); *Arkansas Writer's Project, Inc. v. Ragland, Comm'r of Revenue of Arkansas*, 481 U.S. 221, 231 (1987). To withstand constitutional scrutiny, such legislation must be necessary to promote a compelling interest of the government, and the statute must be shown to be narrowly drawn to achieve that end. *Simon & Schuster*, 112 S. Ct. at 509.

Even an ostensibly "incidental" financial limitation upon a member of the general public speaking on matters of public concern heightens a law's First Amendment impact. *Meyer v. Grant*, 486 U.S. 414, 424-25 (1988).

This Court has required the government to shoulder a heavy burden in justifying a regulation creating financial burdens on speech. For example, the Court in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), overturned a state use tax on paper and ink that impacted most heavily on the print media. The Court held that where the government has at its disposal alternative means of achieving the same interest without raising concerns under the First Amendment, legislation creating a discriminatory financial impact upon First Amendment rights will not survive scrutiny. *Id.* at 586, 592-93. In this case, the financial burden imposed upon government employees engaging in First Amendment activities is likewise substantial, and has the effect of prohibiting outright certain speech. See 5 U.S.C. app. § 505(3) (Supp. V 1993). Certainly the financial burden created by the ban has a substantial chilling effect on employee First Amendment rights, and will discourage some speech because of the prohibition on compensation. *Meyer*, 486 U.S. at 424-25. Although the honorarium ban does not single out appearances, speeches or articles regarding only certain topics, the ban does single out any "appearances, speeches, and articles" by federal executive branch employees. 5 U.S.C. app. § 505(3) (Supp. V 1993). The ban's burden, therefore, extends to the exercise of First Amendment rights by government employees regardless of content or context. *Id.*

While Petitioner agrees that the financial burden on career federal employees under the ban triggers First Amendment concerns, Petitioner suggests that the content-neutral nature of the ban somehow lessens the impact on targeted employees. (Brief at 15-16 n.17). However, the court of appeals found that

the conduct at issue was not limited to matters of only personal or private concern. *NTEU v. United States*, 990 F.2d 1271, 1273 (D.C. Cir. 1993); *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977). SEA contends that, because the ban's financial burden extends to employees speaking as private citizens on matters of public concern, the Respondents' interests in exercising First Amendment rights are enhanced. In fact, the ban has a chilling effect on all speeches, articles or appearances by government employees, including those involving matters of public concern. *See* 5 U.S.C. app. § 505(3). A distinction between speech on matters of public concern as opposed to other comments by public employees cannot be determined in the abstract, when the speech has not even occurred. What is certain is that the ban prohibits compensation for speech that relates to matters of public concern. It is thus overly broad and likewise impacts on the exercise of constitutional rights by career government employees.

The honorarium ban in this case is not a tax, such as the discriminatory regulation in *Minneapolis Star*, 460 U.S. at 592-93, in that its financial limitations are not aimed at the government's critical interest in the collection of revenue. Yet the ban's effect is similar to that of an absolute tax on the receipt of compensation for the exercise of free speech by government employees in that its sanctions have notable censorial effects.³ This Court has found that even the threat of sanctions may deter the exercise of First Amendment rights almost as potently as the actual application of sanctions, and on that basis has invalidated governmental regulations. *Id.* at 588 (*quoting NAACP v. Button*, 371 U.S. 415, 433 (1963)).

Clearly, the honorarium ban's imposition of sanctions, and the resulting censorial effect of those sanctions, for engaging in

³ Under the ban, the United States Attorney General is authorized to bring a civil action against any employee violating its provisions, and courts may assess a civil penalty in the amount of \$10,000 or the amount of the honoraria, whichever is greater, against the employee. 5 U.S.C. app. § 504(a) (Supp. V 1993).

certain free speech activities regardless of any nexus of the speech to federal employment substantially infringe on the First Amendment rights of career federal employees. Thus, Petitioner must carry a heavy burden in justifying this legislation. SEA contends that Petitioner has failed to do so here.

2. Application of the Honorarium Ban to Career Executive Branch Employees was Unjustified, Given the Existence of Less Speech-Restrictive Alternatives.

SEA does not contend that the government is required to use the "least restrictive means" to promote its interest in promoting the efficiency of the federal service. But the Court has never condoned overbroad speech-limiting legislation drafted as a blanket solution to a specific administrative problem. *Shelton v. Tucker*, 364 U.S. 479, 488-490 (1960). The Court has considered the existence of less-restrictive alternatives in determining whether government regulation of speech is overbroad, and not "finely tailored" to promote the government's ends. *E.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 798-800 (1989); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 586-88 (1983); *Shelton*, 364 U.S. at 488.

SEA submits that there are well-established measures already in place to combat the corruption targeted by the honorarium ban that are less speech-restrictive than a prophylactic ban on the compensated free speech of career employees. For example, federal law prohibits all executive branch employees from receiving compensation for the performance of job duties from any outside source. 18 U.S.C. § 209 (1988 & Supp. V 1993). Also, in 1989 President Bush issued Executive Order 12,674, which established principles of ethical conduct applicable to all employees in the executive Branch. Exec. Order No. 12,674, 54 Fed. R. 15,159 (1989), 5 U.S.C. § 7301 note (Supp. V 1993). The Order's intent was to ensure that every citizen

would have complete confidence in the integrity of the federal government. *Id.* The provisions of the Order perform some of the same functions encompassed by the honorarium ban by including express prohibitions on the following: holding financial interests that conflict with the conscientious performance of duty; the improper use of non-public government information to further any private interest; the solicitation or acceptance of any gift or other item of monetary value from any person or entity with an interest in activities regulated by the employee's agency; and the use of public office for private gain. *Id.*

The Executive Order was later used as a platform by the OGE when it promulgated regulations interpreting the Ethics Reform Act of 1989.⁴ 5 C.F.R. Parts 2635 & 2636 (1994); 57 Fed. R. 35,006, 35,036 (1992); *see also* 5 U.S.C. app. § 503(2) (Supp. V 1993). The OGE regulations contain a comprehensive scheme of ethical conduct guidelines universally applicable to career federal employees, inclusive of a ban on acceptance of honorarium by career federal employees.⁵ However, OGE in-

⁴ Prior to the Ethics Reform Act of 1989, Title IV of the Ethics in Government Act of 1978 authorized the Office of Personnel Management, rather than OGE, to promulgate regulations aimed at preventing conflict of interest situations by federal employees. Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824, 1862-64 (amended 1989). Title IV was enacted in response to perceived shortcomings in the previous system, under which the Civil Service Commission and the executive agencies promulgated rules and regulations to implement financial disclosure and conflict of interest principles set forth in Executive Order 11,222. Senate Governmental Affairs Committee, Ethics in Government Act of 1978, S. Rep. No. 95-170, 95th Cong., 2d Sess. 28-31 (1977), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4244-47.

⁵ Congress itself has historically been exempt from the guidelines listed in this section, except for the honorarium ban provisions. It is unclear from the limited legislative history of section 501(b) how Congress suddenly developed a grave concern over the receipt of honorarium by career federal employees and career executives for off-duty conduct unrelated to the performance of their duties.

terpreted the prohibition on honorarium in the Ethics Reform Act as requiring a nexus between appearances, speeches or articles by a government employee, and the performance of their job duties.⁶ *See* 5 C.F.R. § 2636.202 (1994). The regulations also contain provisions expressly derived from the principles of ethical conduct set forth in section 101 of Executive Order 12,674, which prohibit receipt of compensation for teaching, speaking, or writing related to the employee's official duties. 5 C.F.R. § 2635.807(a) (1994).

The aforementioned OGE guidelines also authorize individual executive branch and independent agencies to issue supplemental regulations concerning the ethical conduct of its employees in concurrence with the OGE. 5 C.F.R. § 2635.105 (1994). A growing number of government agencies have issued proposed and final regulations concerning outside employment and other subjects, which implement restrictions on employee conduct in addition to the OGE regulations set forth in 5 C.F.R. Part 2635. For example, the Department of the Treasury has proposed regulations requiring its employees to obtain prior approval before engaging in any outside employment or business activities with or without compensation. 58 Fed. Reg. 41,199 (1993) (to be codified at 5 C.F.R. § 3101.104). Similar limitations have been implemented by the Department of Defense, 5 C.F.R. § 3601.107 (1994), the ICC, 5 C.F.R. § 5001.104 (1994), the CFTC, 5 C.F.R. § 5101.103 (1994), and the FTC, 5 C.F.R. § 5701.101 (1994).

Based upon the foregoing, career federal employees have long been subject to a comprehensive scheme of ethical regulations concerning on- and off-duty conduct. There exist adequate

⁶ A statute should not be construed in a way that would invalidate a series of regulations promulgated by the agency charged with administering that statute. *Athens Community Hosp., Inc. v. Schweiker*, 743 F.2d 1, 8 (D.C. Cir. 1984). Upholding the ban's application to career executive branch employees in this case would certainly invalidate the OGE's regulatory scheme concerning acceptance of honorarium.

limitations on executive branch employee conduct both in, and outside, the federal workplace to promote the stated interests of the government. The existence of an adequate system of safeguards which do not overburden the free speech of career employees demonstrates that Congress could have more narrowly defined its legislation to accomplish the legislative purpose of the honorarium ban without unnecessarily impeding the First Amendment rights of career federal employees and executives.

3. The Government's Real Interest in Enacting the Honorarium Ban is Not Promoted by the Ban's Application to Career Federal Employees.

Even where the government demonstrates a compelling interest in support of a regulation impacting on the First Amendment, the regulation will not survive constitutional scrutiny unless it is narrowly drawn or finely tailored to advance that specific interest. For example, in *Simon & Schuster, Inc. v. Members of the New York Crime Victims Bd.*, 112 S. Ct. 501 (1991), the Court reviewed a state statute which forcibly appropriated income received by an accused or convicted criminal from writings or other works describing his crime. *Id.* at 504-05. The government's stated interest in that case was in preventing criminals from recounting the story of their crimes for profit before the victims of the crime were compensated. The Court found, however, that the government's real underlying interest was in compensating the victims of violent crimes. *Simon & Schuster*, 112 S. Ct. at 510-11. Thus, the Court held that the law was not narrowly tailored to advance the state's real interest in compensating crime victims. *Id.* at 512.

Like the Crime Victims Board in *Simon & Schuster*, which unsuccessfully argued in support of New York's "Son of Sam" legislation, Petitioner here has asserted no substantial interest in burdening First Amendment rights of career executive branch

employees where the limitation does not promote the efficiency and integrity of the government. Rather, SEA contends that the Government's real interest in this case lies in preventing impropriety or the mere appearance of impropriety by government employees for activities which bear some nexus to agency functions. In fact, the government has no real underlying interest in limiting compensation to the career civil employee or executive who engages in off-duty expressive conduct unrelated to his federal employment. Thus the government's interest in upholding this law as to these employees is less weighty than its interest in applying this law to non-career appointees and Members of Congress. 135 Cong. Rec. H8767 (daily ed. November 16, 1989) (statement of Rep. Weiss).

The honorarium ban provisions of the Ethics Reform Act were intended primarily to allay perceptions by the public that Members of Congress were selling influence or appearing to sell influence by receiving compensation for speeches, public appearances, endorsements and the like. 135 Cong. Rec. H8747-48 (daily ed. Nov. 16, 1989) (statement of Rep. Martin); 135 Cong. Rec. H8767 (daily ed. November 16, 1989) (statement of Rep. Weiss); 135 Cong. Rec. S15,971-72 (daily ed. November 17, 1989) (statement of Sen. Mitchell); *see also* To Serve With Honor: Report of the President's Commission on Federal Ethics Law Reform 35 (Mar. 9, 1989) (Wilkey Commission Report) (J.A. 252-53). Rather than being a reasoned approach to restoring public confidence in governmental institutions, the extension of the honorarium ban to encompass career federal employees was an interrelated trade-off for the roughly twenty-five percent raise in its own salaries implemented by virtue of the pay raise legislation. *See* 135 Cong. Rec. H8747 (daily ed. Nov. 16, 1989) (statement of Rep. Martin); 135 Cong. Rec. S15,971-72, S15,987 (daily ed. Nov. 17, 1989) (statement of Sen. Mitchell).

At the same time, Congress apparently decided to extend these provisions not only to Members, but also to all federal executive branch and judicial branch employees. *See generally* Wilkey Commission Report at 35-36 (J.A. 253-54). However, in so doing, Congress did not express concerns about the receipt of outside income or honorarium by any career federal employee, or even career members of the Senior Executives Service, where there was no connection between the payments or payor, and the employee's federal functions. *Id.* Notably, while Congress did not ultimately include pay raise provisions for career executive branch employees in the final Legislative Branch Appropriations Act of 1992, the honorarium ban remained in place as applied to all career federal employees, including the Senior Executive corps. Pub. L. No. 102-90, 105 Stat. 447, 450 (codified as amended at 2 U.S.C. § 5318 note); *also* Wilkey Commission Report at 37-38 (J.A. 255-57); 5 U.S.C. app. §§ 501(b), 505(2) (Supp. V 1993). Though Petitioner, relying on the Wilkey Commission Report, (Brief at 19-20), suggests that its interest in extending the ban to career employees was enunciated in that Report, the Wilkey Commission did not identify a single specific evil stemming from the receipt of honoraria by career employees for speech unrelated to their employment. Wilkey Commission Report at 35-36 (J.A. 252-54).

Like the New York Crime Victims Board in *Simon & Schuster*, Petitioner appears to assert that the purported effect of the honorarium ban, namely, achieving administrative efficiency in the government by prohibiting honorarium for all employee speech, is in fact the government's primary interest. (Brief at 16-17). The government reasons that the honorarium ban's prohibition as applied in this context promotes the integrity of the federal workforce, furthers administrative efficiency, and serves as a prophylactic measure that resists attempts at evasion. *Id.* In making this contention, however, Petitioner essentially concedes that the ban affects more speech than was

justified to promote the purposes of Congress. (Brief at 16-17, 35).

Therefore, the real interest of the government in promoting governmental efficiency and integrity does not justify the enactment of the honorarium ban as applied to career federal employees.

4. The Honorarium Ban is Unconstitutionally Overbroad in that it Regulates More Speech Than is Necessary to Serve the Government's Underlying Interest.

SEA does not dispute that the government has a strong interest in protecting the integrity and efficiency of public service and in avoiding even the appearance of impropriety created by abuse of the practice of receiving honorarium. *See NTEU v. United States*, 990 F.2d 1271, 1274 (D.C. Cir. 1993). However, the government must demonstrate that its financial regulation of career federal employee speech promotes a substantial government interest that would be achieved less effectively absent the regulation. *See Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). As noted by the court of appeals, the principles and analysis enunciated in *Ward* are applicable to the honorarium ban's content-neutral economic regulation of speech by its employees. *NTEU*, 990 F.2d at 1274; *see also Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 112 U.S. 501, 511 n.** (1991). The government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. Rather, each activity within the regulation's proscription must be an appropriately targeted evil. *Ward*, 491 U.S. at 799-800 (citing *Frisby v. Schultz*, 487 U.S. 474, 481 (1988)).

The court of appeals, applying these principles, correctly found that an articulated nexus between the employee's job and his employment was required to create the sort of impropriety or appearance of impropriety at which the statute is ostensibly

aimed. *NTEU*, 990 F.2d at 1275. In so holding, the court echoed a long line of this Court's cases dealing with similar issues. *E.g.*, *Pickering v. Board of Educ.*, 391 U.S. 563, 569-70 (1968); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). The Court found in *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985), that a mere hypothetical possibility of a corrupt exchange of political favors is not sufficient to carry the government's heavy burden. *Id.* at 498. Rather, there the Court required a real connection between the conduct and the danger to the efficiency of the service. *Id.* at 500-01. The honorarium ban at issue here is overbroad.

The honorarium ban burdens equally employee speech having no conceivable relationship to one's performance of job duties, and employee speech that may have a bearing on one's government employment.⁷ Receipt of honorarium by non-career and career federal employees and executives for certain First Amendment activities, where those activities have a nexus to the performance of agency functions, is arguably an evil appropriately targeted by the honorarium ban. *NTEU*, 990 F.2d at 1275-76. However, the ban's prohibition on the receipt of honorarium by career federal employees for expressive activity that has no relationship to federal employment is not justifiable on the same grounds.

Petitioner suggests that its broad-ranging economic regulation of speech unrelated to governmental business may reflect an excessive, yet somehow acceptable, degree of caution. (Brief at 35). SEA disagrees. None of the ban's legislative history suggests that Congress even addressed the issue of whether

⁷ A number of specific examples of employee speech activities were identified in the lower court proceedings in this action as being affected by the ban. *NTEU*, 990 F.2d at 1275. In addition to these examples, it is generally known within the Washington, D.C. federal government community, or is capable of accurate and ready determination, that members of the Senior Executive Service also engage in off-duty speech activities unrelated to their employment that will have consequences under the ban. See Fed. R. Evid. 201(b).

employee speech unrelated to government employment posed a threat to governmental efficiency or integrity. See, e.g., 135 Cong. Rec. H9253-57 (daily ed. November 21, 1989) (extension of remarks of Rep. Fazio). Thus it is disingenuous for Petitioner to now intimate that Congress employed any degree of caution in implementing this regulation against career executive branch employees. In fact, evidence introduced at trial by the Respondents revealed numerous specific examples of employees who would be unreasonably burdened by the law. *NTEU*, 788 F. Supp. at 6 & n.1. The purported interest of the government in applying the ban to career employees for speech unrelated to employment, namely, forestalling in the executive branch the same types of ethics scandals and public disapproval that plagued the legislature, is speculative at best, and cannot support the overbreadth of the ban in the *Pickering* balance.

Because of the indiscriminate nature of the ban, Petitioner cannot accurately contend that a substantial portion of the honorarium ban's burden on speech serves to advance congressional goals. The government has not identified any public perception of corruption in the receipt of honorarium by career federal employees for expressive activity lacking a nexus to federal agency functions. In fact, the government concedes that it would prefer to overburden employee speech rather than to allow even a few "questionable" payments to occur.⁸ (Brief at 35). The ban so applied is not a regulation narrowly drawn, or finely tailored, to serve the government's interest in avoiding the appearance of impropriety or in promoting efficiency.

The public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment—extends to the exercise of free speech by public employees whose speech is unrelated to the fact of their employment. *Pickering v. Board of Educ.*,

⁸ As explained in Section C.2., *supra*, such "questionable" payments are probably already prohibited by, or certainly could be proscribed by, existing regulatory machinery.

391 U.S. 563, 573-74 (1968). Respondents, and the members of the Senior Executive Association, therefore, have an overriding interest in engaging in off-duty speech that has no nexus to the efficiency of the federal service. Likewise, these career executive branch employees have the right to be free from inhibitory effects of congressional legislation on the exercise of this right in the absence of a substantial and important governmental interest justifying the legislation. *Id.* at 574. Without having identified a specific danger to the efficiency of the government flowing from career employees exercising these rights, Congress nevertheless imposed a broad and indiscriminate financial burden and disincentive on employee speech.

Based on the foregoing, under the *Pickering* balancing test the interest of career executive branch employees, including career senior executives, in exercising the right to speak on issues of public importance outweighs the interest of the government in promoting the efficiency and integrity of the federal service. Because the honorarium ban is not a regulation narrowly drawn or finely tailored to serve the government's interest in avoiding the appearance of impropriety or in promoting efficiency, the interest of employees in exercising the constitutional right to free speech outweighs the government's interest in upholding the overbroad honorarium ban. Therefore, the honorarium ban must be struck down.

5. The Honorarium Ban is Unconstitutionally Underinclusive Because It Prohibits the Receipt of Compensation Only for Certain Forms of Expressive Conduct.

The D.C. Circuit did not reach the issue whether the honorarium ban is unconstitutionally underinclusive because it found that the ban was overbroad. *NTEU v. United States*, 990 F.2d 1271, 1277 n.5 (D.C. Cir. 1993). But in order to withstand constitutional scrutiny, the government bears a heavy burden in

justifying a statute that discriminates among different forms of speech. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228-31 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983); *News Am. Publishing, Inc. v. FCC*, 844 F.2d 800, 804-05 (D.C. Cir. 1988). Where governmental action singles out certain First Amendment conduct for adverse treatment, the courts have inferred an intent to single out the content of the message, and have therefore required a closer fit between the law and its apparent purpose than for other legislation. *News Am. Publishing*, 844 F.2d at 805. It simply is no defense to a discriminatory statute to argue, as Petitioner argues here, that other avenues of expression remain available to the affected class of persons in spite of the law's prohibition. (Brief at 16). Rather, more rigorous constitutional scrutiny of such legislation is required. *News Am. Publishing*, 844 F.2d at 805.

SEA contends that the honorarium ban also must fall because of its underinclusiveness. The ban prohibits the receipt of compensation by career executive branch employees for appearances, speeches and articles. 5 U.S.C. app. § 505(3) (Supp. V 1993). However, the ban does not specifically prohibit receipt of compensation by a career executive branch employee for off-duty teaching, fiction writing, theatrical or musical performances, poetry, art, or a broad range of other expressive conduct. *Id.* Thus the ban has a chilling effect upon expressive activity to the extent that this activity is an appearance, speech or article. Because the honorarium ban discriminates against certain forms of speech, while not regulating other forms of expression, a close fit is required between the ban and its apparent purpose. *News Am. Publishing*, 844 F.2d at 805.

The honorarium ban would not necessarily be saved even if Congress chose to prohibit employee receipt of compensation for engaging in specific speech activity where these particular activities were demonstrated as drawing intense and disapprov-

ing public scrutiny to suspect honorarium payments. As stated by the district court below, the statute's focus on speech "belies the notion that the governmental interest in suppressing questionable payments is paramount to all others . . ." *NTEU v. United States*, 788 F. Supp. 4, 11 (D.D.C. 1992). Congress has clearly placed a great burden upon executive branch employees by regulating their participation in arguably the most available, most effective, and the most public means of expression.

Petitioner asserts that there are still numerous expressive activities that are not foreclosed to executive branch employees by virtue of the honorarium ban. However, Congress' selectivity raises at least the inference that it was concerned about the content of employee speech. Without exploring the actual motives of Congress in limiting only three modes of speech under the ban, SEA contends that the underinclusive nature of the honorarium ban triggers a more rigorous constitutional scrutiny of this legislation. *News Am. Publishing*, 844 F.2d at 805.

II. BECAUSE THE HONORARIUM BAN VIOLATES THE FIRST AMENDMENT AS APPLIED TO CAREER FEDERAL EMPLOYEES, IT WAS PROPERLY SEVERED BY THE COURT OF APPEALS.

Congressional legislation that is objectionable on constitutional grounds must be invalidated. However, unless it is evident that the legislature would not have independently enacted the invalid provisions, the invalid part may be dropped if what is left is fully operative as law. *Alaska Airlines, Inc. v. Brock, Secretary of Labor*, 480 U.S. 678, 684 (1987); see also *NTEU v. United States*, 990 F.2d 1271, 1278 (D.C. Cir. 1993) (citing *Buckley v. Valeo*, 424 U.S. 1, 108-109 (1976)). If the balance of the legislation is incapable of functioning independently, Congress could not have envisioned such a severance. *Alaska Airlines*, 480 U.S. at 684. In this regard, courts should refrain

from invalidating more of the statute than is necessary. If the remaining statute will function in a manner consistent with the intent of Congress, then the objectionable portions of it may be severed from the whole. *Id.*

In this case, the honorarium ban is constitutionally deficient due to Congress' indiscriminate infringement on the First Amendment rights of career federal employees and executives. The ban infringes on the free speech of career federal employees where the off-duty activity has no nexus to the nature of the employee's performance of duty. In the absence of a ban on receipt of honorarium by career employees, the ban's provisions could remain fully operative as law as applied to Members of Congress and their staffs, non-career federal employees, and judicial branch employees. The remaining provisions fully address the evils Congress identified concerning acceptance of honorarium by these classes of public employees. Yet, except for the severance accomplished by the court of appeals, the ban does not readily admit of alternative construction that addresses Respondents' concerns. *NTEU*, 990 F.2d at 1277. For example, insertion of a nexus test appears to be a purely legislative function. *Id.*

Severance of a statute is largely a question of legislative intent, with a presumption in favor of severability. *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion). Because the Court must refrain from invalidating more than is necessary, the court of appeals correctly severed the words "officer or employee" from the statute at issue. As discussed *supra*, Congressional intent to apply the honorarium ban provisions to career executive branch employees, and to speech unrelated to the performance of job duties, appears to be a legislative afterthought. The legislative history of the Ethics Reform Act is replete with references to the perceived evil of Members of Congress receiving honorarium. *E.g.*, 135 Cong. Rec. H8747-48 (daily ed. Nov. 16, 1989) (statement of Rep.

Martin); 135 Cong. Rec. H8767 (daily ed. November 16, 1989) (statement of Rep. Weiss); 135 Cong. Rec. S15,971-72 (daily ed. November 17, 1989) (statement of Sen. Mitchell). However, the record is silent on whether the same concerns apply to non-political, career executive branch employees. Thus, the lack of any clear legislative intent for the broad scope of this prohibition allows for severability.

Amicus Common Cause argues in its Brief that the D.C. Circuit's remedy was overbroad, and that the plaintiff class has no standing to defend high-level executive branch employees from the limitations of the ban. (Amicus Brief at 24). SEA contends, however, that the interest of Congress, if any, in limiting the acceptance of compensation for speech by career executive branch employees is the same for senior-level career employees as for lower-level career employees.

Career members of the Senior Executive Service are highly-trained, highly-skilled professional managers, with special qualification requirements, and are subject to rigorous triennial recertification by the employing agency. 5 U.S.C. §§ 3393(c), 3393a. Yet career members of the SES share the same personnel authority, namely, the Office of Personnel Management, as other career executive branch employees, including the members of the plaintiff class in the instant case. 5 U.S.C. § 3132(a)(4) (1988 & Supp. V 1993). These career managers are subject to the same ethics regulations and limitations, and are entitled to some of the same employment rights as members of the plaintiff class here. *Compare* 5 U.S.C. §§ 7511, 7513, *with* §§ 7541, 7543; *see also* 5 C.F.R. § 2635.102(h) (1994). The career positions occupied by these employees thus distinguish them from the politically appointed commissioners of the FTC, the NLRB, the SEC, or members of the President's cabinet, as cited by Amicus Common Cause. Career executives are subject to political and interest group pressures only to the same extent as career executive branch employees at any other level.

SEA, on behalf of its membership, therefore contends that it has the same interest as members of the plaintiff class in exercising fundamental First Amendment rights. Likewise, SEA has the same interest as Respondent in receiving compensation for these activities where the activity in question is not improper, and where it raises no appearance of impropriety. Career members of the Senior Executive Service will be adversely affected to the same degree as Respondent and members of the plaintiff class if the honorarium ban is allowed to stand.

Amicus Common Cause further contends that the court of appeals erred in not fashioning an appropriate remedy that would apply the ban to at least some lower-level executive branch employees. (Amicus Brief at 25). SEA does not agree. The court of appeals was not focusing on the pay or grade level of particular career federal employees in concluding that the ban may have some application to executive branch employees. Rather, the court below highlighted the fact that, for many executive branch employees whose off-duty speech activities bear some relationship to their federal employment, the concerns of Congress in enacting the ban may have some validity as to these employees. *NTEU*, 990 F.2d at 1274. SEA acknowledges that there may be valid application of the ban to career employees or career executives whose activities bear a nexus to the performance of job functions. However, SEA challenges any attempt to segregate among levels of career federal employees for purposes of applying the ban to speech lacking such a nexus simply on the basis of pay or grade level. Clearly such a distinction is not justified by the scant legislative record in this case. Even if such a distinction were justified, there is no conceivable severance of the ban provision that could accomplish such a result. *NTEU*, 990 F.2d at 1279.

Congressional silence as to severability does not raise a presumption against severability. The statute at issue here is clearly incapable of alternative construction without the Court

performing a legislative function. The court of appeals properly severed the honorarium ban provision as applied to executive branch employees.

CONCLUSION

The honorarium ban provisions of the Ethics Reform Act of 1989 were intended to address mounting public perceptions of impropriety resulting primarily from the acceptance of honorarium by Members of Congress. The Senior Executives Association does not advocate a distinction between different levels of career executive branch employees for purposes of the ban's application. Rather, SEA asserts that the First Amendment protects all career executive branch employees from unjustified intrusions on the freedom of speech, where the speech activities of career employees and executives targeted by the ban are unrelated to the missions of the employing agencies. The Constitution demands restraint when Congressional action infringes upon fundamental constitutional rights, which Congress failed to employ in applying the honorarium ban to career executive branch employees whose off-duty speech activities bear no relation to their employment.

Based on the foregoing, the Court should affirm the judgment rendered below.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

UNITED STATES OF AMERICA, *et al.*,
v. *Petitioners,*

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**BRIEF OF AMICI CURIAE FREEDOM TO READ
FOUNDATION, ASSOCIATION OF AMERICAN
PUBLISHERS, INC., PEOPLE FOR THE
AMERICAN WAY, PEN AMERICAN CENTER
AND THE NATIONAL WRITERS UNION
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICI CURIAE*

The Freedom to Read Foundation ("Foundation") is a non-profit organization established in 1969 by the American Library Association ("ALA"). The ALA is the oldest and largest library association in the world and the chief voice of the modern library movement in North America. ALA's membership includes more than 3,000 institutions, primarily libraries, and more than 54,000 individuals, primarily librarians. The ALA established

the Foundation in order to promote and defend First Amendment rights, foster libraries as institutions fulfilling the promise of the First Amendment for every citizen, support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and set legal precedent for the freedom to read of all citizens.

The Association of American Publishers, Inc. ("AAP") is the major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately two hundred members include most of the major commercial book publishers, including university presses and scholarly associations. AAP's members publish works which run the gamut of published materials, including non-fiction, biography, history and fiction.

The National Writers Union ("NWU") is an affiliate of the United Auto Workers, AFL-CIO, committed to improving the rights of freelance writers through the collective strength of its members. Founded in 1983, the NWU has thirteen local chapters throughout the country and some 4,000 members including journalists, novelists, biographers, historians, poets, children's book authors, textbook authors, commercial writers, technical writers and cartoonists. The NWU frequently testifies on First Amendment issues, and fervently believes that freedom of expression is essential to ensuring both the quality and diversity of information available in a free society.

PEN American Center ("PEN") is an organization of 2,400 novelists, poets, essayists, translators, playwrights, and editors, chartered to defend free and open communication within all nations and across national boundaries. PEN has taken a leading role in attacking restrictive laws, rules, regulations and practices that censor, curb, or limit freedom of speech or expression. Among its members are executive branch employees who are directly affected by the challenged statute.

People for the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has over 300,000 members nationwide. People For has represented parties in litigation and filed *amicus* briefs before this Court in major cases defending the First Amendment's guarantee of freedom of expression. It joins in this *amicus* brief because this case raises dual concerns of protecting the First Amendment rights of employees to speak and the public to hear, as well as the integrity of our democratic political process.

The primary function of the *amici* writers' organizations is to encourage, support, and advance all authors' rights—including authors who happen to be government employees—to the end of maximizing creative expression for distribution to the public. The primary function of libraries and publishers is to make protected expression available to the public. The *sine qua non* of their existence is the ability to acquire new writings that can be made available for public distribution. *Amici* are participating here because this case raises important First Amendment questions not only for the government employees whose speech is deterred by the challenged statute, but also for those members of the public who will be deprived of the opportunity to read the articles and hear the speeches of those government employees who will no longer write or speak in the absence of compensation for their efforts. Additionally, the statute directly affects many members of the *amici* groups such as librarians and other employees of federal libraries, many of whom are members of ALA, as well as many government employee writers who are members of the various writers' organizations.

Because the honorarium ban will deter government employees from speaking and/or writing, the ban will reduce the amount of materials available for public dissemination by writers, publishers and libraries, and for review by the public. Thus, the ban threatens the mission of publishers and libraries, and violates the First Amendment rights of the reading public as well as of the government employees who have been silenced. For this reason, *amici* urge this Court to hold that the honorarium ban violates the First Amendment.

STATEMENT

Amici adopt respondents' statement of the case.

SUMMARY OF ARGUMENT

The statute challenged in this case bars Executive Branch and other federal employees from receiving an honorarium for any single speech, appearance, or article, whether or not related to their jobs. Reform Act § 601(a), 103 Stat. 1760, codified at 5 U.S.C. App. 501(b) (Supp. IV 1992) ("section 501(b)").¹ This Court has recognized that imposing a financial disincentive on speech, or removing a financial incentive to speak, can constitute a significant burden on First Amendment rights. *See, e.g., Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 112 S. Ct. 501, 508-09 (1991). Here, it is clear that many government employees will not write or speak without compensation. As a result, section 501(b) will effectively prevent the public from having the opportunity to read or listen to these government employees, even on subjects completely unrelated to their jobs. Such a statute imposes a substantial burden on protected speech.

¹ As noted *infra*, the statute allows compensation for a *series* of speeches, articles or appearances unrelated to an employee's job. It imposes no limit on compensation for other forms of expression.

Moreover, there is no governmental interest justifying this substantial burden. If the government's interest is in preventing government employees from profiteering—trading on information or skills obtained by virtue of their federal employment—then the statute covers far more speech than could affect that interest since the statute requires no nexus between the expression and the employees' federal employment. On the other hand, if the government's interest is in preventing covert payoffs, then the statute is too narrow because it allows unlimited compensation for some types of expression, but no compensation for others. For example, since the ban applies only to works of non-fiction, an employee would be barred from being paid \$100 for writing a biographical article about Abraham Lincoln, but could be paid a million dollars for writing a fictionalized account of life in the Lincoln White House. Similarly, since the ban does not apply to a "series" of speeches or articles (unless they are related to an employee's job), there would be no limit on compensation for a *series* of historical articles about Lincoln. These distinctions are inexplicable if the interest being served is the prevention of corruption.

Finally, it is difficult to credit any asserted interest in avoiding case-by-case determinations about the permissibility of honoraria, when the statute itself requires such determinations in many cases. Thus, for example, Congress apparently believed it was practical to determine whether a given "series" of speeches or articles have a nexus to an employee's job. That determination cannot be more difficult with respect to *single* articles, speeches or appearances.

In sum, the statute imposes a substantial burden on speech and will reduce the pool of materials available for libraries and publishers to disseminate. The governmental interests that have been or could be asserted to justify this burden are either insufficient or implausible. Before the Court can uphold a law imposing a substantial burden on expression, it should demand more.

ARGUMENT

This case involves the claim that section 501(b), by banning Executive Branch employees² from accepting compensation for any article, speech, or appearance, imposes a significant and unjustified burden on protected speech. This Court's decisions involving restrictions on government-employee speech, *see, e.g., Waters v. Churchill*, 114 S. Ct. 1878 (1994), as well as other cases involving substantial, but content-neutral, burdens on speech, *see, e.g., Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 62 U.S.L.W. 4647, 4658 (June 28, 1994), all support application of at least an intermediate balancing test in this context.³ In *Turner*, this Court very recently applied this intermediate level of scrutiny to content-neutral provisions of the Cable Act and held that the regulation could be sustained only if it furthered a substantial governmental interest, and if the "restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 4658 (citation omitted). The Court added that "[n]arrow tailoring in this context requires . . . that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

In essence, applying the intermediate scrutiny level of review requires the Court to determine whether there is a substantial burden imposed on speech and, if so, whether substantial governmental interests exist to justify both the nature and the extent of that burden. The proper

² This action challenges the statute only as it applies to Executive Branch employees.

³ Because the statute distinguishes between fiction and non-fiction, it could be viewed as a content based restriction that would be subject to strict scrutiny. It is not necessary to reach that point, however, because the statute plainly fails even intermediate scrutiny.

resolution of these questions here is relatively straightforward: the honorarium ban obviously imposes a substantial burden on First Amendment rights, and there is no government interest that plausibly justifies such a burden.

I. THE FINANCIAL DISINCENTIVE IMPOSED BY THE CHALLENGED STATUTE IS A CONSTITUTIONALLY SIGNIFICANT BURDEN.

This Court has recognized that the First Amendment's guarantee of freedom of speech prohibits the government from imposing unjustified financial disincentives upon those who choose to engage in protected expression. *See, e.g., Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 508-09 (1991). Indeed, the United States effectively concedes this point, noting that "removing a financial incentive to engage in expression does trigger First Amendment concern." Pet. Br. at 15 (citing *Simon & Schuster*). The government, however, then attempts to ease its burden of justification, arguing that any interference with protected expression caused by this statute is limited to government employees, who receive government salaries and remain free to speak without compensation. This effort to skew the constitutional balance, before the governmental interests are even examined, should be rejected. Section 501(b) imposes a sweeping limitation on the speech of hundreds of thousands of Americans, and can only be upheld if there are concrete and convincing governmental interests that support this degree of restriction.

A. The Case Law Demonstrates That a Financial Burden on First Amendment Rights Requires Heightened Scrutiny.

This Court has consistently held that a law preventing would-be speakers from receiving financial rewards for their speech constitutes a significant burden on First Amendment rights, requiring demonstration that a sub-

stantial governmental interest is furthered by that burden. Most recently, for example, in *Simon & Schuster*, the Court invalidated a New York statute requiring that proceeds from any writing by a convicted felon relating to his crimes be escrowed in a fund available for compensating the author's victims. After five years, any remaining funds were to be distributed to the author. 112 S. Ct. at 511. Thus, the statute did not necessarily preclude compensation. Rather, it delayed it, while creating the possibility that compensation would be denied altogether depending on the circumstances of a given case. In determining the degree of the burden on First Amendment rights, the Court reviewed a long list of serious works of literature which would likely come within the statute's sweep. It noted that "[t]he argument that a statute like the Son of Sam law would prevent publication of all of these works is hyperbole—some would have been written without compensation." *Id.* at 511. Yet the Court treated the potential interference with compensation as a serious burden on First Amendment rights.

The chilling effect on speech caused by financial disincentives was also at issue in *Meyer v. Grant*, 486 U.S. 414, 421-23 (1988). There, the Court struck down a Colorado statute that prohibited compensation to petition circulators. It concluded that the effect of the statute was to limit the number of voices who would convey appellants' message, because even though some petition circulators would circulate petitions without pay, many would not. Thus, the statute effectively limited the size of the audience for the petitions.⁴

⁴ In a related context, the Court has also held that an ordinance prohibiting solicitation of contributions by charitable organizations that did not use at least 75 percent of their receipts for "charitable purposes" was an unconstitutional financial burden on the charities' First Amendment rights that would chill the exercise of those rights. *Village Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). See also, *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984) (statute pro-

Simon & Schuster and *Meyer* recognize that preventing compensation will result in less speech. These cases assume the truth of what the government here has not contested: although some people will write or speak for free, many will not. See also *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 967 (1984) (statute imposing financial limits on expenses of fundraising would likely "restrict First Amendment activity").

That same reality was expressly recognized by the Framers of the Constitution, when they provided that "The Congress shall have Power . . . To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const., art. I, § 8. The constitutional and statutory grant of copyright protection "is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). "Absent such [copyright] protection, there would be little incentive to create or profit in financing such [writings], and the public would be denied an important source of historical information." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 557 (1985).

hibiting charitable organization from using more than 25 percent of funds raised to defray expenses of fundraising violated the First Amendment because financial disincentive would chill protected speech); *Riley v. National Federation of the Blind of N.C., Inc.*, 487 U.S. 781 (1988) (statute limiting fundraisers to charging "reasonable" fees, and linking presumptively reasonable fees to percentage of amount raised, violated First Amendment).

As the copyright analogy suggests, the ultimate basis for recognizing a First Amendment right to receive compensation for speech is the interests of those who might otherwise never hear or read that expression. "Freedom of speech presupposes a willing speaker," but "the protection afforded is to the communication, to its source and to its recipients both." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (emphasis added). Thus, in the broadcasting context, the Court has stated that "[i]t is the right of viewers and listeners . . . which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . . It is the right of the public to receive . . . ideas . . . which is crucial here." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388-90. See also *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

It does little good, after all, to leave publishers the freedom to publish new works, and libraries the freedom to purchase and lend them, if those works are not being written. And there is a limit to how much will be written without hope of compensation. Many valuable works are created primarily, if not solely, because the author hopes to receive fair payment in return for the value of the information being communicated. It is thus no answer, when a law prevents compensation for protected speech, to say that the speaker remains at liberty to speak for free. Such a law interferes substantially with the interests of the speaker, of those who would make the speech available, and of those who would ultimately hear it, and thus harms the overall system of free expression. It requires a substantial justification.

B. The Financial Burden Imposed by This Statute Is Substantial.

Petitioners mount a number of arguments in an effort to show that the "burden" in this case is relatively inconsequential. This effort is both irrelevant and unpersuasive. It is irrelevant because it is conceded in this case that the honorarium ban burdens protected speech. Once that concession is made, the analytic focus should shift to the identification of substantial countervailing government interests, and a determination whether they could be served less intrusively.⁵

In any event, petitioners fail in their effort to minimize the effects of the ban. First, they point out that the ban only applies to government employees. Pet. Br. 14. Although this fact is relevant to the types of governmental interests that may justify the ban, it should not by itself lessen the degree of scrutiny accorded to a law that interferes with the free expression of hundreds of thousands of citizens on topics wholly unrelated to their government employment. Public employees do not check their First Amendment rights at the door when they enter government service. And a great many of them have expertise and knowledge on a vast array of subjects of interest to the public at large. Thus, for example, among the employees who filed affidavits in this case, the proposed topics of compensated discourse range from Russian history (J.A. 38-39) to the repopulation of wolves in the national forests (J.A. 67) to dance criticism (J.A. 77).

⁵ A true "balancing" test—weighing a speech restriction of a particular severity against a state interest of a particular significance—would be wholly incoherent and subjective. The proper approach, as suggested by *Turner Broadcasting, supra*, and *United States v. O'Brien*, 391 U.S. 367, 377 (1968), is to determine whether the restriction is sufficient to trigger heightened scrutiny and then examine whether the restriction actually furthers substantial government objectives without burdening speech more than is reasonably required.

Government has historically attracted workers with interests beyond the confines of their government job. A list of this country's preeminent authors includes many who served as government employees at one time or another. For example, Herman Melville was a customs inspector; Sydney Lanier was a postal clerk in Macon, Georgia; Walt Whitman copied documents for the Department of the Interior and in the Attorney General's office; Thomas Paine was an exciseman while still in England; Nathaniel Hawthorne was a "measurer of salt, coal, etc." at Boston Custom House and a surveyor at Salem Custom House; and O. Henry was a draftsman in a state land office. While it would be hyperbole to suggest that these writers would not have written their important works had this statute been in effect during their government tenure, the point is that government employees, like all other citizens, may have profound reflections or even simply useful information—completely unrelated to their jobs—the expression of which, and the receipt of which, are fully protected by the First Amendment. As writers, publishers and libraries, *amici* are keenly aware that the effect of the lost incentive to create is the loss of materials created, and the consequent reduction of material in library collections and on publishers' lists.

The government also points out that employees (1) may recover the costs of travel and other direct costs they incur in writing or speaking, (2) have government salaries to support them, and (3) may accept compensation for a variety of forms of expression *other* than speeches and articles. Pet. Br. 16-17. But these arguments miss the mark as well. The constitutional concern in this case is not the impoverishment of federal workers who would otherwise have received honoraria, but the potential for interference with the flow of a broad category of protected expression. The government does not deny that this potential exists, despite the allowance of expense reimbursement, the payment of salaries to the affected persons,

and the availability of compensation for other kinds of speech. Pet. Br. 17 ("Some federal employees will undoubtedly choose not to engage in one or more of these activities because they cannot be paid for doing so."). Nor could it deny the obvious—*i.e.*, that when compensation for one activity is banned, the affected parties will tend to do something else.⁶

II. PETITIONERS HAVE NOT SHOWN THAT THE STATUTE'S INTERFERENCE WITH PROTECTED EXPRESSION IS JUSTIFIED BY A SUBSTANTIAL GOVERNMENTAL INTEREST.

Once the spotlight of judicial inquiry focuses on the second prong of the balancing test—the government's justification for burdening its employees' First Amendment rights—it becomes clear why the government tried so hard to minimize the burden it is imposing. For if that burden is taken for what it is—a substantial interference with First Amendment interests requiring a substantial justification—petitioners cannot prevail: they cannot articulate a governmental interest that is sufficiently substantial to justify the statutory restriction at issue.

The most obvious rationale for banning compensation for speech by government employees during "off hours" would be to prevent profiteering—*i.e.*, trading on knowledge or skills developed on the job at government expense. Petitioners cannot make such an argument, however, because the ban extends to expression that has nothing to do with a speaker's public employment. They neverthe-

⁶ A government employee who accepts compensation in violation of this law may be subjected to a civil penalty of up to \$10,000. 5 U.S.C. App. 504(a). Although the government argues that this provision *reduces* the chilling effect of the statute because the statute does not provide a *criminal* penalty, *see* Pet. Br. at 43, n.30, it seems obvious that the average government worker would find the prospect of paying out \$10,000 more than slightly numbing.

less attempt to do so indirectly, arguing that if the ban were limited to speech with a nexus to government employment, there would be a potential for "evasion." Pet. Br. 18. This assertion is nonsensical. It is true, of course, that under a nexus test there would be borderline cases where the presence or absence of a connection to a speaker's government job would be unclear. But we doubt petitioners mean to argue that Congress may ban honoraria for all speeches, articles, and appearances merely because of the possibility that some employees will attempt to evade a more focused ban in those cases where the nexus to government employment is less than clear.

Next, petitioners argue that banning honoraria (even for speeches or articles unrelated to government employment) is valuable for its own sake, as a means of preventing corruption and the appearance of impropriety. This "corruption" rationale depends on the proposition that payments for speeches and articles, regardless of their topics, will sometimes constitute covert efforts to purchase influence, or at least will be so perceived by the general public. That proposition is at least plausible, but there is a clear problem: this articulated interest bears no relation to the forms of compensation that Congress chose to permit and to forbid. To begin with, the statute bars *any* compensation for a speech, article or appearance, even in amounts too small to create any actual or apparent impropriety. At the same time, it permits unlimited compensation for other kinds of expression or conduct that raise the same "covert payoff" questions.

Thus, for example, the ban allows compensation to writers of fiction, poetry, song lyrics or plays, but bars compensation to writers of history, science, philosophy, art, or any other non-fiction topic. 5 C.F.R. § 2636.203(d). It allows compensation for books or chapters of books, but not for works to be published in magazines or other collections of articles. *Id.* An "appearance" is defined

to preclude honoraria for attendance at public or private conferences, meetings, or other gatherings and remarks made at that time, but not for "performances using an artistic, athletic or other such skill or talent or primarily for the purpose of demonstration or display." 5 C.F.R. § 2636.203(b). Under these regulations, then, government employees are allowed to accept compensation for playing in a softball game, or for modeling in a fashion show, but a government employee who happened to be a descendent of Samuel Clemens could not accept compensation for appearing and speaking at a festival honoring their ancestor. A government employee could be compensated for an appearance as a stand-up comic, but not for an appearance as a botanist. There is no conceivable basis for explaining these distinctions in terms of the government's articulated interest in preventing actual or apparent corruption.

Similarly, the regulations that disallow compensation for "speeches" *allow* compensation for the recitation of scripted material (unless the invitation was extended because the speaker was a government official) and for conducting religious ceremonies (except that an employee who is a minister may not receive compensation for taking part in a service conducted by another minister). *Id.* § 636.203(c). Finally, if the government employee can string out her work product into a "series" of three or more "different but related" articles, speeches, or appearances that are not directly related to her official duties, then compensation is allowed; if she is concise and succinct, however, compensation is prohibited. *Id.* § 2636.203(a)(13).⁷

⁷ The statute defines "honorarium" as "a payment of money or any thing of value for an appearance, speech, or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government)." 5 U.S.C. § 505(3).

Under these rules, absurd results often obtain. A government employee may be compensated for writing a poem about jonquils for the local horticulturists' club newsletter, but may not be compensated for giving a speech to the same club about how to grow them. A government employee may be compensated for writing a fictionalized but historically accurate article about Lincoln's writing of the Gettysburg address, but may not be compensated for writing a simply historically accurate one. These examples make clear that the ban disallows compensation only for particular kinds of expression although other kinds of expression *on exactly the same subject to exactly the same audience* are compensable.

Because the ban singles out particular kinds of expression for unfavorable treatment, but allows other kinds of expression without penalty, it cannot be said to further the government's asserted interest. Indeed, these arbitrary distinctions among media and categories of speech not only undermine the government's case but raise additional concerns of their own. Cf. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (striking down tax applicable to general interest magazines, but not to newspapers or religious, professional, trade and sports journals). Moreover, this distinction between kinds of writing for compensation affects *amici*. Library collections and publishers' lists are incomplete and do not serve the public without a broad range of materials, including non-fiction.

The government's final argument is that it may impose a flat ban on honoraria for particular forms of expression because a more discriminating rule would be less efficient. Pet. Br. 20-23 (narrower rule would require costly case-by-case determination). But it is difficult to take seriously an asserted interest in avoiding case-by-case determinations when the statute itself necessarily requires such determinations in many cases. After all, it defines "honorarium" as "a payment of money or any thing of value

for an appearance, speech or article (including a series of appearances, speeches, or articles *if the subject matter is directly related to the individual's official duties or the payment is made because of the individual's status with the Government*).” 5 U.S.C. App. § 505(3) (emphasis added). Thus, the government is already required by statute to set up an administrative mechanism for applying a nexus test. And the government already requires the ethics officers in each agency to determine when a group of three or more articles constitutes a “series.”

Indeed, even a single appearance, speech or article covered by the ban may raise case-by-case questions for the ethics officers. For example, if an employee writes a piece and submits it for publication as an article in a magazine, as well as to a textbook publisher, does compensation depend on whether it is accepted as a chapter in a book rather than as an article? Or, if a play in which an employee appears requires some improvisation by its actors, does that constitute the compensable reading of a script? Or, is an article on Thomas Jefferson treated as compensable “fiction” because it contains imaginary dialogue which may never have taken place, even though it is otherwise completely historically accurate?

In setting up the honorarium ban, Congress chose to create an administrative process to handle some questions raised by the ban, including determining when a “series” of speeches or articles is sufficiently connected with the employee's job that compensation should be denied because the integrity of the government might be questioned if compensation were allowed. The government has not shown that including single speeches, articles, or appearances in that process would significantly increase its administrative burden. In fact, most agencies already routinely make such determinations in applying other statutes and standards of conduct. See e.g., Internal Revenue Service Rules of Conduct, J.A. at 212-219 (providing that compensation for outside activities may be approved for

IRS employees if that activity will not "A) result in a conflict of interest or the appearance of a conflict of interest with his/her official duties and responsibilities; or B) bring discredit upon or lower public confidence in the Internal Revenue Service; or C) interfere with his/her efficient performance of his/her duties or his/her availability for duty."). Moreover, even if requiring a nexus to insure that the regulation affects only the speech necessary to address the government's interest does marginally increase the government's administrative burden, that increase is constitutionally required by the First Amendment.

Here, as the court of appeals found, and as the government has recognized, much of the speech deterred by the honorarium ban is completely unrelated to the employee's job, and is made to audiences without any connection to the employee's job or agency. Because there is no nexus between the government's articulated interest—insuring the appearance of propriety and the public's confidence in government—and the denial of compensation for much expression that would not affect that interest, "a substantial portion of the burden on speech does not serve to advance [the statute's] goals." *Ward*, 491 U.S. at 799 (1986).

CONCLUSION

Because the honoraria ban violates the First Amendment rights of the government employee speakers and writers, of publisher and library distributors, and of public listeners and readers, the decision of the United States Court of Appeals for the D.C. Circuit should be affirmed.

Respectfully submitted,

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